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RIGHT TO COUNSEL FOR INDIGENT DEFENDANTS IN MISSISSIPPI

Sherwood W. Wise

FEDERAL INCOME TAXATION OF TIMBER

Hampton Stennis Little, Jr.

EXPERT MEDICAL TESTIMONY IN MISSISSIPPI

Warren H. Adam

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Mississippi Law Journal

VOLUME XL MARCH 1969 NUMBER 2

RIGHT TO COUNSEL FOR INDIGENT DEFENDANTS IN MISSISSIPPI

*Sherwood W. Wise**

The Moving Finger writes; and having writ,
Moves on: Nor all your Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it.

Fitzgerald, *The Rubaiyat of Omar Khayyam*,
Stanza 71

I. Introduction

In a recent decision[1] by Chief Judge William C. Keady of the United States District Court for the Northern District of Mississippi sharp focus was drawn on a situation which he characterized as a "legal vacuum in Mississippi state criminal proceedings." Judge Keady further stated:

> Inaction, or failure to act in passing necessary legislation to meet this problem, will not militate against a maintenance of the constitutional right. In those terms, continued local inertia will be the root cause of bringing to a grinding halt prosecutions of misdemeanors and like offenses because of procedural, constitutional infirmity.[2]

What is this legal vacuum which threatens to halt prosecutions of certain offenses against the laws of the State of Mississippi? What brought about this situation? What should be done to right the matter? These and related questions are the subject of this article. Hopefully, our present dilemma now can be pinpointed and some constructive suggestions for its solution offered.

* B.A. and L.L.B., Washington & Lee University; Partner, Wise, Carter & Child, Jackson, Mississippi; President Mississippi State Bar, 1961-62.

[1] Phillips v. Cole, Civil Action No. GC 6842-K (N.D. Miss., October 2, 1968). *See also* James v. Headley, 37 U.S.L.W. 2611 (5th Cir. 1969), which appeared too late for comment in this article.

[2] *Id.*

II. Case Law Presenting the Problem

A. Gideon and its Precursors: Right to Counsel in Felony Cases.

Beginning in 1963 with *Gideon v. Wainwright*[3] the courts of the United States have virtually rendered ineffective the procedures long provided by the State of Mississippi for the furnishing of legal representation for indigents accused of crimes against the state. In *Gideon* the Supreme Court of the United States, speaking through Mr. Justice Black, overruled *Betts v. Brady*,[4] where the Court had held that the right to counsel in state courts was not an absolute right required for a fair trial by the fourteenth amendment due process clause, but that this right depended on the circumstances and upon the seriousness of the offense. In *Gideon* the Court ruled unconstitutional the conviction of an indigent for whom the State of Florida did not provide counsel.

In overruling *Betts v. Brady*, the *Gideon* Court purported to be correcting its own error and to be reinstating the "well-considered precedents" of *Powell v. Alabama*[5] and *Johnson v. Zerbst*.[6]

In *Powell* the Court required the state to supply counsel to an indigent defendant accused of a capital offense, whether requested by defendant or not, as a prerequisite of due process.[7] The Court did not state whether or not the principle was applicable in other cases. In the *Zerbst* case the Court held that "the Sixth Amendment withholds from *Federal* courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[8] (emphasis added).

In *Betts v. Brady*, however, the Court refused to extend the *Zerbst* holding to the states, based on its conclusion that the right to counsel in non-capital cases was not fundamental to due process and a fair trial except in "special circumstances."[9] The rationale of *Gideon*, however, is that the right to counsel *is* fundamental to a fair trial and due process. Therefore, the sixth amendment guaranty is effective in state courts.

B. Right to Counsel in Non-felony Cases: Misdemeanors

In the same year that *Betts v. Brady* was decided, the United States Court of Appeals for the District of Columbia decided *Evans v. Rives*.[10] The defendant Evans was sentenced to one year in jail after conviction

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[3] 372 U.S. 335 (1963).
[4] 316 U.S. 455 (1942).
[5] 287 U.S. 45 (1932).
[6] 304 U.S. 458 (1938).
[7] 287 U.S. at 71.
[8] 304 U.S. at 463.
[9] 316 U.S. at 471.
[10] 126 F.2d 633 (D.C. Cir. 1942).

on a guilty plea in juvenile court for refusal to provide support and maintenance for his minor child. He was not represented by counsel, nor was he advised of his right to counsel.

On appeal from the district court's denial of his petition for writ of *habeas corpus,* the court of appeals, relying heavily on *Zerbst,* held that the defendant's sixth amendment rights had been violated because of the failure of the court to tell him he could have a lawyer or to tell him he was waiving his right to counsel.[11] Thus, the right to counsel was extended to misdemeanors—in a federal court.

This is the basis of the court's decision:

> It is further suggested by the District of Columbia that the constitutional guaranty of the right to the assistance of counsel in a criminal case does not apply except in the event of 'serious offenses.' No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.[12]

After *Gideon* was handed down in 1963 there was no question about the right to counsel in felony cases, but the Court did not say anything about that right where the offense was a misdemeanor. In 1965, the Fifth Circuit decided *Harvey v. Mississippi,*[13] wherein Harvey was convicted of a misdemeanor on a guilty plea without aid or waiver of right to counsel. The conviction was rendered in a Leake County Justice of the Peace court. Harvey was sentenced to ninety days and fined $500. Judge Mize, United States District Judge, dismissed his petition for *habeas corpus,* and the Fifth Circuit reversed, holding that Harvey's conviction without being advised of his right to counsel or a waiver of the right was a fatal defect—even though the offense was a misdemeanor and even though the defendant pleaded guilty.[14]

The court cited the principles in *Johnson v. Zerbst* and reasoned its extension of the right to counsel to cases of misdemeanor in the following language:

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[11] *Id.* at 641.
[12] *Id.* at 638.
[13] 340 F.2d 263 (5th Cir. 1965).
[14] *Id.* at 271.

> It is true that the cases which support appellant's argument all involved felony convictions, but their rationale does not seem to depend on the often purely formal distinction between felonies and misdemeanors. One accused of crime has the right to the assistance of counsel before entering a plea because of the disadvantageous position of an unassisted layman in a court of law and because of the serious consequences which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as on an accused felon. The record reveals that the guilty plea entered in the case at bar had grevious consequences indeed.[15]

The court then set forth the language from *Evans v. Rives* quoted above[16] and concluded that:

> While the rule as thus stated has never been expressly extended to misdemeanor charges in state tribunals, it has been argued that such a principle is implicit in the Supreme Court's decision in Gideon v. Wainwright (citation omitted). Be that as it may, the reasoning in Evans along with other recent right-to-counsel decisions persuades us that we should apply that rule in the present case.[17]

In 1965 the Fifth Circuit also decided the case of *McDonald v. Moore*,[18] which involved an indigent defendant's petition for a writ of *habeas corpus* after his conviction for a misdemeanor on a guilty plea. The Florida Supreme Court previously had held that *Gideon* applied only in felony cases; therefore, the *habeas corpus* petition was permitted to lie because it would have been fruitless to require the defendant to exhaust state remedies by appealing to the Florida Supreme Court. Relying heavily on its recent decision in *Harvey* and on the *Evans* case, the court of appeals said: "We do not think it can be said that counsel must be appointed in all felony cases but not in any misdemeanor cases."[19]

In addition to felonies and misdemeanors, there is a vague area of quasi-criminal offenses classified as "juvenile crime or delinquency." Before the Supreme Court decided *In Re Gault*[20], delinquent juveniles were dealt with before special courts with informal procedures, confidential records, and a judge who was supposed to act in the minor's best interest with almost unfettered discretion. According to the opinion by Justice Fortas, this system was better than the old nineteenth century system of putting the juvenile in jail with the hardened criminals, but

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[15] 340 F.2d at 269.
[16] *Supra* note 13 and accompanying text.
[17] 340 F.2d at 271.
[18] 353 F.2d 106 (5th Cir. 1965).
[19] *Id.* at 108.
[20] 387 U.S. 1 (1967).

it was susceptible to frequent infringements of the freedom of juveniles because of the lack of procedural safeguards, among which are the rights to counsel and an adversary hearing.

Mr. Justice Fortas summed up the Court's holdings as to right to counsel as follows:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[21]

Judge Keady's recent opinion in *Phillips v. Cole*[22] follows the Fifth Circuit misdemeanor cases cited above and the *Gault* case. The *Phillips* case involved several Negroes under eighteen years of age who were arrested on a variety of misdemeanor charges during a civil rights demonstration in Indianola. Before trial in either the mayor's court or youth court, the defendants filed this suit in federal court to enjoin their prosecution in state court without observance of their sixth amendment rights. Conviction in the mayor's court would carry a maximum sentence of $500 or six months in the county jail, or both. Commitment by the youth court in a training school might be for a maximum period of time extending until each defendant was twenty years of age.

Judge Keady granted the injunction and concluded that the state was required to furnish counsel for those minors unable to retain private counsel because of indigency. He said he was aware that the state courts lack authority to compensate counsel they might appoint in misdemeanor cases, but answered this problem as follows:

> In the light of the foregoing conclusions, the court is brought to the ultimate problem in this case of state law, apparently, failing to provide a method of clearly employing and compensating court-appointed counsel in other than felony cases. Of what relevancy, one may ask, is it that state judicial officers, such as defendants here, who are acting in good faith in the discharge of their duties, lack the authority to compensate counsel they might appoint in misdemeanor cases? The answer must, and can only, be that constitutional rights must be recognized and upheld, regardless of consequences. This court recognizes that the lack of hiring authority may cause real concern, as well as undoubted confusion, to state law enforcement officers and state judges. It is fair to observe that if

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[21] *Id.* at 41.

[22] Civil Action No. GC 6842-K (N.D. Miss., October 2, 1968).

there is a dilemma which here results, it is not caused by recognition of Sixth Amendment rights as consistently interpreted in the Fifth Circuit in the three years since the Harvey decision. Any *legal vacuum* resulting in the state criminal proceedings is a situation for which responsibility cannot be laid at the door of this court. The State of Mississippi, in undertaking to define crime and prosecution thereof, must, at all events, comply with the demands of the Constitution of the United States. *Inaction, or failure to act in passing necessary legislation to meet this problem, will not militate against the maintenance of the constitutional right. In those terms, continued local inertia will be the root cause of bringing to a grinding halt prosecutions of misdemeanors and like offenses because of procedural constitutional infirmity.* The practical effects of the holding today cannot become a matter of concern, for my obligation is to uphold the United States Constitution, upon practically undisputed facts, in accordance with the decided, controlling decisions on the subject. (emphasis added).[23]

C. When Does Accused Have Right to Counsel?

Not only are we confronted with the questions discussed above as to the nature of the crime involving the right of indigents to counsel, but we are also confronted with the problem of the time at which these rights accrue.

In *Miranda v. Arizona*[24] the Supreme Court held that the right to counsel begins at least as early as police questioning of an arrestee. The Court stated that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . ."[25] In addition, if the arrestee is unable to employ a lawyer, the police must clearly advise him that "One will be appointed for him prior to any questioning if he so desires."[26] Thus, *Miranda* extends the *Gideon* rule back to the interrogation process, and confronts the state with the necessity of devising a workable means of providing counsel for indigents arrested and interrogated in Mississippi.

In the recent decision of *Williams v. United States*,[27] the court cited as its authority *Mallory v. United States*.[28] In *Williams*, *Mallory* was held applicable to a line-up identification made while the defendant was in custody for one charge, and the line-up was held for and used at trial

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[23] *Id.* at 10.

[24] 384 U.S. 436 (1966).

[25] *Id.* at 471.

[26] *Id* at 479.

[27] 37 U.S.L.W. 2379 (D.C. Cir., December 20, 1968).

[28] 354 U.S. 449 (1957).

on another charge for which no lawful arrest had been made. The court went on to say:

> After they arrest a person, the police, of course, have a right to continue collecting evidence against him. Nothing in the Mallory rationale requires that the investigative process come to a stop once an arrest is made. We view the purpose of the Mallory rule, however, as requiring the police promptly to present the defendant to a magistrate so that he can be judicially advised of his rights, including the right to counsel and, if requested, be provided with counsel to protect him during any 'critical' stage in the prosecution against him.
>
> The teaching of United States v. Wade (citation omitted) is that the line-up is just such a stage.[29]

III. The Present System In Mississippi

An assigned counsel system is now provided by statute for indigent defendants.[30] Under this statute, when a *felony* defendant appears in court without an attorney and cannot afford to hire one, the circuit judge appoints one for him from the membership of the bar in that county. Under this statute, the circuit judge in term time or in vacation may appoint counsel to defend an indigent who has been indicted for a felony or who is merely in jail charged with a felony. The statute, however, provides only nominal and inadequate compensation for counsel. For capital cases the following schedule obtains:[31]

For final settlement of the case without trial after indictment	$ 75.00
For final conclusion of the case by trial, either upon the merits or the issue of insanity	150.00
For final conclusion of the case on appeal to and decision by the State Supreme Court	250.00
In non-capital felonies the respective fees are:	$50.00; $100.00; $200.00

Professor Parham H. Williams, Jr., in a very able article[32] gives the results of the docket survey and questionnaire conducted in 1966 by the

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[29] 37 U.S.L.W. at 2379; *accord,* Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968).

[30] Miss. Code Ann. § 2505 (Supp. 1966).

[31] *Id.*

[32] Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process,* 37 Miss. L.J. 353 (1966) and 38 Miss. L.J. 57 (1966) and 38 Miss. L.J. 254 (1967).

Mississippi State Bar and the School of Law, University of Mississippi. This article, as well as a speech[33] by Professor Williams, should be studied carefully by anyone interested in fully pursuing this subject. Among other facts, this survey revealed that the eighty-two counties in Mississippi spent in the year 1965 in providing legal assistance to indigents the sum of $39,531.00. The average fee per case was $55.68. The results of the docket study and questionnaire indicate that the disadvantages of the system are: an absence of specific statutory authority for early appointment under the *Miranda* rule; an unfair compensation schedule; and the complete lack of authority to reimburse assigned counsel for expenses incurred in the preparation of the case, or for the services of investigators and experts.

Of course, the statute applies only to felonies, and there is no authority whatsoever to appoint counsel to defend indigent misdemeanants or juveniles.

IV. Past Proposals To Mississippi Legislature

The first effort to cope with the situation created by the court decisions was made in the 1966 regular session of the Legislature. Prior thereto, in 1965, the Public Defender Committee of the Mississippi State Bar had considered the desirability of instituting a public defender system in Mississippi. This committee studied the system then in operation in other states and compared the effectiveness of such systems with the needs and problems in Mississippi. Based on such study, the committee recommended to the Mississippi State Bar that it work for the enactment of the public defender system in this state.[34] The Committee then drafted a public defender act which it deemed best suited for the needs of Mississippi.[35]

As is pointed out in Professor Williams' article, the draft legislation provides for a statewide public defender system with a public defender being elected for each circuit court district. The defender would possess the same qualifications as the district attorney, and would be compensated on the same basis. Provision is made for the appointment of assistants in certain of the larger districts, and both the defender and the assistants would be paid out of the state treasury. An important feature of the draft is the provision for the payment of investigative and

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[33] Address by Parham H. Williams, Jr., Mississippi State Bar, Junior Bar Section, June 24, 1965, in 36 Miss. L.J. 520 (1965).

[34] *Report of Public Defender Committee, Committee Reports—Senior Bar,* 37 Miss. L.J. 593 (1966).

[35] This draft legislation appears as an Appendix to Professor Williams' article, 38 Miss. L.J. at 276 (1967).

expert services. These payments would be allowed by the circuit judge on motion of the public defender, and would be made out of the county treasury in an amount not to exceed a total of $300.00. There is also a provision for the appointment of counsel in certain instances wherein the public defender is overburdened or is representing clients with conflicting interests. An interesting feature of the draft is the provision creating a lien on the property of the defendant. This lien is enforceable by the several public defenders, and the proceeds therefrom are utilized to reimburse the state to help defray the costs of the system.

In 1966, this bill was introduced in the House of Representatives of the Mississippi Legislature as House Bill 1104. It was committed to the Judiciary Committee where it died. The bill was also introduced in the Senate as Senate Bill 2153.[36] The Senate Judiciary Committee changed the bill drastically and reported it out, and one amendment was adopted on the floor of the Senate. The bill passed the Senate and was held on motion to reconsider, and that motion was later defeated.[37] The Senate bill then went to the House, where it died in the Judiciary Committee.

It will be noted that the House version applied only to indigents accused of a felony. The Senate version, as passed there, applied to a felony, a misdemeanor or other charge, where there was a possibility of a jail sentence.

Following the failure of the Legislature to enact a bill at its regular 1966 session, the Mississippi State Bar continued to study the matter. The Public Defender Committee, with Circuit Judges Arthur B. Clark, Jr. and Darwin M. Maples as Chairman and Co-chairman, respectively, and with the Honorable George D. Warner, Jr. as Co-chairman, made a report to the 1967 Convention of the Mississippi State Bar, which was approved by the convention.[38]

The adopted report expressed the opinion that in order for an indigent to be assured of his right to counsel under the sixth amendment to the Constitution, the following steps must be taken:

> (1) The courts should by rule adopt a working definition of indigency such as, 'an indigent accused is one who does not have assets or credit available to obtain legal counsel to represent him in reference to the offense with which he is charged', or, 'an indigent accused is one who has neither assets nor credit

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[36] *See* Appendix I *infra.*

[37] *See* House Journal, Mississippi Regular Session *and* Senate Journal, Mississippi Regular Session (1966).

[38] *Supra* note 37.

available in an amount equal to the minimum fee schedule of the local bar in reference to the offense charged.'

(2) Indigency of accused should be determined a reasonable time after arrest by a person capable of making a responsible application of the definition of an indigent. (An attorney or judicial official, not a justice of the peace.)

(3) Counsel should be made available to an indigent a reasonable time after arrest to assist him in resolving questions of bail, investigation, preliminary hearing and the like. This representation should continue through trial and appeal and further if in the opinion of counsel such is reasonably necessary to the protection of the rights of the accused.

Counsel should be afforded the indigent in felony cases and in those involving a serious misdemeanor (possible punishment of six months county jail and fine of $500.00). It should be noted that a substantial minority of the committee feels that counsel should be provided for misdemeanors where the possible punishment can be six months county jail *or* a fine of $500.00. For an indigent, a fine of $500.00 is the same as a sentence of six months.[39]

The committee then recommended that the Legislature enact appropriate legislation to afford an indigent accused protection of his rights, placing the burden of the expense upon the taxpayers as a whole instead of imposing too much of it upon the bar, which is the result of the system presently existing.[40]

The committee recommended action in the form of one of the following alternatives, listed in order of preference:

(1) A public defender system statewide roughly matching the District and County Attorney system.

This was favored by the committee roughly 2 to 1. A proposed bill is enclosed. This bill could probably be improved but is adequate for its initial purpose. Some members of the committee favored restriction of the public defender and his assistants to the practice of criminal law only. Such a restriction might result in limiting the quality of the applicants. Other suggestions included the inclusion of judicial approval to assistant public defenders, or allowing for his judicial removal; also that the public defender electing to receive salary as provided for full time district attorney, should not engage in private practice.

(2) A bill substantially increasing allowances and expenses for counsel appointed by the court to defend the indigent. A proposed bill is enclosed. Such a measure would be of

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[39] 1966-67 *Committee Reports to the Mississippi State Bar* at 50.

[40] *Supra* note 37 at 594.

some substantial relief to attorneys as compared to the present system. A substantial minority of the committee favored such a measure.

(3) Some type of public defender on a county-wide basis instead of a judicial district basis.

Perhaps a mandatory directive by the legislature for counties having populations in excess of a certain number could be considered. The defender here would roughly be the equivalent of the county attorney. No proposed bill is presently available but one will be prepared prior to the next legislative session.[41]

As pointed out, the committee recommended and the bar convention agreed that the preferential solution to the problem is that of a statewide public defender system.[42] It was pointed out that a public defender can provide the best and most efficient representation for indigents. Not only would he be an experienced attorney because of the volume of cases that he would handle, but he would have certain resources to assist him. He would have a file, for example, of motions, pleas, demurrers, etc. that he would build up as a result of his experience in office.

The committee's third choice was a bill to provide for the office of county public defender on a county option basis.[43] This would provide for an election in each county on the question of the establishment of the system, a procedure which is deemed impractical and unrealistic.

At the 1968 regular session of the legislature another effort was made to deal with this troublesome situation. The leadership in both houses was genuinely interested in dealing effectively with the problem.

Senate Bill No. 1568[44] on appointed counsel was introduced in an effort to raise the compensation of appointed counsel and to provide for investigative, expert, or other services necessary to an adequate de-

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[41] 1966-67 *Committee Reports to the Mississippi State Bar* at 51.

[42] *See* 38 Miss. L.J. 594 (1967).

[43] *Id.*

[44] This bill is the same as that which appears at 38 Miss. L.J. at 274 with the exception that ¶ 5 is added to § 1, reading as follows:

> In the discretion of the judge in vacation or the court in term time, depending upon the seriousness of the case, the provisions herein with respect to appointment of counsel and investigative, expert, or other services for indigent defendants in felony and capital cases, shall also apply to indigent persons charged with misdemeanor or seeking relief from confinement by habeas corpus, writ of error coram nobis, motions to vacate sentences, youth court matters or any other post-conviction remedy that may be available.

fense, and to include serious misdemeanors in the discretion of the court. This bill passed the Senate but died in committee in the House.

Senate Bill No. 1903,[45] to provide for a system of public defenders in certain counties, was introduced and referred to Judiciary "A" where it died.

A committee substitute for House Bill No. 178[46] (offered as a substitute for the original bill as recommended by the bar committee) providing for public defenders statewide, was passed, but it was held on a motion to reconsider and later was recommitted to committee.

The committee substitute made some rather drastic changes from the original bill as recommended by the bar. It changed § 5 so as to (1) require the defender to be admitted to the bar at least one year, (2) set salary at $8500.00, and (3) not allow the public defender and assistants to engage in private practice of law.[47]

The substitute bill changed § 6 of the original by striking out the paragraph allowing the public defender to engage in civil practice of law, and also made the following changes:

(1) it changed § 8 to include serious misdemeanors;

(2) it changed § 9 so as to (a) set the salary for a secretary and provide method of paying other clerical help and investigators; (b) provide for each county board of supervisors to supply office space and office expenses and (c) set mileage and travel expense allowances;

(3) it changed § 11 so as to set limitations for fees for investigative or expert services;

(4) it changed § 13 by rearranging the statement concerning paying appointive counsel more than $500.00 in extraordinary circumstances;

(5) it changed § 14 by (a) providing for a lien on defendant's property to include any property acquired in the future, and (b) by removing the statute of limitation reference and providing for collection by the sheriff and disposition of the funds collected;

(6) it changed § 15 by removing reference to the University of Mississippi law students' giving assistance, and provided for students to be obtained from any accredited law school with a defender project;

(7) it added a completely new § 16 providing for (a) method of keeping records, (b) reporting cases, and (c) receiving compensation.[48]

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[45] *See* Appendix II *infra.*

[46] *See* Appendix III *infra.*

[47] *Id.*

[48] *Id.*

It was probably the change in the bill which prohibited the public defender and assistants from engaging in the private practice of law which engendered the most opposition to the bill itself. With certain exceptions, district attorneys are permitted to engage in the private practice of law. The general sentiments seem to be that the public defenders should be allowed the same privileges. Probably any future bill which contains this prohibition will run into the same difficulty.

A pilot project of a public defender system established on a judicial district level and initiated in November, 1965, in the nineteenth judicial district comprising Jackson, George and Greene Counties has shown how effective this system can be in a Mississippi situation. This project was launched with funds provided by the Ford Foundation through an American Bar Association committee. Unfortunately, it expired on March 1, 1969, for lack of further financing. The program has had the support of the local bar association and of Circuit Judge Darwin Maples, and of all of the law enforcement agencies in these counties. The program, according to these sources, has greatly benefited the people of the counties and the law enforcement officers, as well as the indigents involved. The success of this pilot project, which is closing only for lack of permanent financing, should be very persuasive with the legislature that a system of this kind is practical and feasible for the people of Mississippi.

Conclusion

In the light of the cases cited above, and in the light of the rapidly changing condition of the law with respect to the defense of indigents accused of crime, and in the light of the probable right in the equation, it becomes increasingly apparent that an adequate public defender system will best serve the needs of the judicial processes in Mississippi. Judge Arthur B. Clark, Jr., Chairman of the Bar's Public Defender Committee, has suggested that the bill establishing a public defender system for the State of Florida be studied as he believes it to be a possible alternative to our present situation in Mississippi. It might be well to consider this bill along with the proposed bills already mentioned.

The two alternatives to a public defender system have certain obvious disadvantages. On an appointive system such as the federal courts now have, with flexible allowances for attorneys' fees and expenses, there is no sure way to estimate probable costs. This system has been subject to considerable criticism in the federal courts and is thought to be of substantial expense. This plan promises no adequate substitute for our present system.

The county option system is a makeshift, and probably would not be provided in some counties where the need is greatest.

The advantages of the public defender system on a statewide basis have been pointed out. All things considered, this system appears to have the best chance of providing a workable solution.

It is suggested that the legal vacuum referred to by Judge Keady, which in his opinion threatens to bring to a grinding halt prosecutions of misdemeanors and like offenses because of procedural constitutional infirmity, can best be filled and eliminated by a workable public defender system, which will take into account all of the constitutional requirements which we now find to exist. All concerned generally agree that something must be done and be done promptly. Agreement on procedures and details surely must result when the guide lines are reasonably clear and where men of good will are attacking the problem.

APPENDIX I

SENATE BILL NO. 2153

(As Passed the Senate)

AN ACT CREATING THE OFFICE OF PUBLIC DEFENDER FOR EACH OF THE CIRCUIT COURT DISTRICTS OF THE STATE AND PROVIDING FOR THEIR ELECTION, COMPENSATION, DUTIES, AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. There is hereby created the office of public defender for each of the Circuit Court districts of the State. Each such public defender shall be licensed to practice law, with not less than two (2) years experience, and a qualified elector in one of the counties of the Circuit Court district.

SECTION 2. The office of public defender, hereby created, shall be filled in each of the Circuit Court districts in the general election to be held for Governor and other State officers in 1967 and each four (4) years thereafter; the person so elected in each said district shall take office on the first Monday of January, 1968, and shall hold office for a period of four (4) years. Each public defender shall receive as compensation for his services salary and expenses equal to that paid to a full time district attorney, which said sum shall be paid in the same manner as the salaries of the district attorneys are paid. In judicial districts wherein the district attorney is provided with an assistant or assistants and/or secretarial help at public expense, the public defender shall be

authorized to appoint the same number of assistants and employ the same number of secretaries to be paid at public expense at the same rate and in the same manner as that fixed by law for the district attorney.

No public defender or his assistants, as herein provided for, nor his law partner, nor any lawyer occupying the same offices, may practice law in any court of law in this State but may practice in chancery.

SECTION 3. The duties of each public defender shall be:

(1) To provide legal representation to every person who is without financial means to secure competent private counsel when charged with a felony, misdemeanor, or other charge where there is a possibility of a jail sentence; such availability for representation shall be at every critical stage of the proceeding against the accused where a substantial right may be affected; and such legal representation shall be available to the accused person upon the request of the accused without fee or charge to the accused.

(2) Such legal representation shall be available immediately after the accused is taken into custody or arrested, at the first and each subsequent court appearance and at every critical stage in the proceeding. For indigent defendants provided for in paragraph 1 hereof, the representation shall include appeal or other post-conviction proceedings to remedy error or injustice; the representation of such indigents shall extend to parole and probation violations and proceedings, extradition proceedings and proceedings involving possible detention or commitment of minors or alleged mentally ill persons.

(3) To provide assistance in having reasonable bail set, and maintain adequate records on each and every case for the proper administration of justice.

SECTION 4. It shall be the duty of the arresting officer to advise each person taken into custody and charged with a felony, misdemeanor, or other charge where there is a possibility of a jail sentence of the availability of the services of a public defender and of the right of the accused to representation by private counsel of his own choice or by the public defender. The sheriff of each county, or other person having custody of a person accused of a felony, misdemeanor, or other charge where there is a possibility of a jail sentence, shall provide a place in the courthouse or jail for conference and consultation between the public defender and each accused person.

SECTION 5. This act shall take effect and be in force sixty (60) days from and after its passage; but the offices hereby created shall not be filled except by election as hereinabove provided.

APPENDIX II

SENATE BILL NO. 1903

AN ACT TO PROVIDE FOR A SYSTEM OF *PUBLIC DEFENDERS IN CERTAIN COUNTIES;* TO PROVIDE FOR THE SELECTION, QUALIFICATION, TERM OF OFFICE, DUTIES AND COMPENSATION OF SUCH PUBLIC DEFENDERS; AND FOR OTHER RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. *The board of supervisors of any county, in their discretion, may establish the office of Public Defenders for said county in the following manner:* Before establishing the office, the board shall adopt a resolution declaring its intention so to do, and stating the date upon which the board proposes to enter its order establishing said office. Such resolution shall be published once a week for at least three (3) consecutive weeks in a newspaper published in such county. The first publication of such resolution shall be made not less than twenty-one (21) days prior to the date fixed in the resolution for the establishment of such office, and the last publication shall be made not more than seven (7) days prior to such date. *If, on or before the date specified in such resolution, twenty per cent (20%) of the qualified electors of the county shall file a written protest against the establishment of such office, then an election on the question of the establishment of such office shall be called and held as is herein provided.* If no such protest be filed, then the board shall enter its order establishing said offices on the date fixed in the resolution.

SECTION 2. When an election is to be called, as provided in the preceding section, notice of such election shall be signed by the clerk of the board of supervisors and shall be published once a week for at least three (3) consecutive weeks, in a newspaper published in such county. The first publication of such notice shall be made not less than twenty-one (21) days prior to the date fixed for such election, and the last publication shall be made not more than seven (7) days prior to such date.

SECTION 3. Such election shall be held, as far as is practicable, in the same manner as other elections are held in counties. At such election, all qualified electors of such county may vote, and the ballots used at such election shall have printed thereon the following: "For Public

Defenders Office" and "Against Public Defenders Office", and the voter shall vote by placing a cross or check mark opposite his choice. If it shall appear that a majority of the qualified electors voting on the question shall vote for the Public Defenders Office, the board of supervisors shall enter its final order establishing said office for such county.

SECTION 4. Should the office of Public Defenders be created under the provisions of this act, *then the Chancellor, the Judge and the Circuit Court, and in those counties, where applicable, the Judge of the County Court, acting upon the recommendation of the executive committee of the local county bar association shall appoint a Public Defender and an Assistant Public Defender who shall hold office for a term of one (1) year from the date of their appointment.* The succeeding Public Defender and Assistant Public Defender shall be appointed in the same manner, and shall hold office for a term of one (1) year from the date of their appointment. If, after the creation of the office of Public Defenders, twenty per cent *(20%) of the qualified electors of such county shall file a written petition with the board of supervisors requesting that the office of Public Defenders be made elective, then the board of supervisors of such county shall adopt an order making such offices elective, or alternatively, shall submit the question of whether such offices should be made elective to an election* called and held as provided in Section 2 and Section 3 of this act, except that the question to be submitted at such election shall be "For an Elective Public Defenders Office" and "Against an Elective Public Defenders Office." If such an order is adopted by the board of supervisors pursuant to an election ordered by the board of supervisors, then the Public Defenders shall be elected at the general election by the qualified electors of the county in the same manner as other county officials are elected and shall serve for a term of four (4) years and until their successors are elected and qualified.

SECTION 5. *The Public Defender and the Assistant Public Defender shall possess the same qualifications provided by law for the County Attorney and shall be subject to the same restrictions and disabilities as are provided by law for the County Attorney, and in addition thereto shall not be associated with either the County Attorney or District Attorney in the practice of law, either as a partner, associate or employee.*

SECTION 6. The Public Defender shall receive for his services an annual salary to be fixed and to be paid by the board of supervisors of the county, *not to exceed Eight Thousand Five Hundred Dollars ($8,500.00). The Assistant Public Defender shall receive the same compensation for his services as the County Attorney.*

SECTION 7. *The Public Defenders Office shall represent any person who is determined to be insolvent as provided by this act, who is under arrest for, or is charged with a felony or serious misdemenor, if* such person requests such representation or if the court, on its own motion, so orders and such person does not knowingly, understandingly and intelligently waive the opportunity to be so represented. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record.

SECTION 8. The Public Defenders Office may, with the consent of the trial court, but without compensation by the county, accept the voluntary services of members of the Mississippi bar in good standing in the defense of an insolvent person.

The Public Defender and Assistant Public Defender shall give priority and preference to their duties under the provisions of this act. *They may engage in the practice of civil law, but only to the extent that it will not interfere with or prevent performance of their duties as Public Defenders and shall not otherwise engage in the practice of criminal law.*

SECTION 9. *The determination of insolvency of any accused person shall be made by the court* and may be done at any stage of the proceedings. The Public Defenders office shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel for his own defense.

SECTION 10. Upon finding in an ex parte proceeding that *investigative, expert or other services are necessary* and that the defendant is financially unable to obtain them, the court shall authorize the Public Defenders Office or assigned counsel to obtain the services on behalf of the defendant. The court shall determine reasonable compensation for the services and direct payment out of the general fund of the county, to the person who rendered them or to the person entitled to reimbursement. *Only in extraordinary circumstances may the court provide for compensation in excess of Three Hundred Dollars ($300.00).*

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

SECTION 11. *On application of the Public Defenders Office the court shall appoint separate counsel for defendants who have such conflicting interests that they all cannot properly be represented by the Public Defender,* or when other good cause is shown. If at any time after the appointment of counsel the court having jurisdiction of the case finds

that the defendant is financially able to obtain counsel or to make partial payment for the representation he may terminate the appointment of counsel or authorize payment as provided by Section 12 of this act, as the interests of justice may dictate.

SECTION 12. An attorney appointed pursuant to Section 11 of this act, shall, at the conclusion of the representation or any segment thereof, *be compensated at a rate of Fifteen Dollars ($15.00) per hour for time reasonably expended in such representation,* and shall be reimbursed for *expenses reasonably incurred.* Where a defendant is charged with one or more felonies, compensation in excess of expenses shall *not exceed Five Hundred Dollars ($500.00)* for all such representation, including that related to an appeal or other post-conviction procedure.

Such compensation and reimbursement shall be fixed by the Circuit Court and shall be paid out of the general fund of the county. In extraordinary circumstances, the court may provide for compensation in excess of the foregoing limits.

Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the defendant for whom he is assigned without approval of the court as herein provided.

SECTION 13. The solvency of any person desiring assistance as provided for in this act shall be determined, in part, by information supplied by that person, and if such person shall knowingly and willingly give fraudulent and false information as to his financial status so as to obtain representation under this act, then such person shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail for a period not to exceed one (1) year, or by a fine not to exceed One Thousand Dollars ($1,000.00), or both.

SECTION 14. Subject to the prior approval of the Circuit Judge, the Public Defender may accept gifts, grants or services from or contract with, non-profit organizations, educational institutions and other state or federal agencies for the purpose of rendering legal aid to insolvent persons and for the purpose of studying, surveying and reporting on the need, use and availability of such aid in the State of Mississippi. The Public Defender or appointed counsel, with the concurrence of the Circuit Judge, may accept the assistance of students of the University of Mississippi School of Law participating in any training program sponsored by such school.

SECTION 15. Upon the establishment of the office of Public Defender, the board of supervisors is hereby authorized, in its discretion, to pay a sum not to exceed Three Hundred Seventy-five Dollars *($375.00) per month for secretarial assistance to* the Public Defender, such sum to be paid out of the general fund of the county.

SECTION 16. In any county where the Public Defenders Office has been created as provided by this act, there shall be levied and taxed as additional costs in each case in all courts of such county where there is a conviction for a criminal offense, the sum of Three Dollars ($3.00), which sum shall be paid into the general fund of such county.

SECTION 17. The application of this act shall be limited to those counties now or hereafter creating a county port authority under the provisions of Chapter 199 of the Laws of 1956 as amended and supplemented, except as to counties electing to institute cooperative programs with counties in which the office of Public Defenders has been established under Section 18 of this act.

SECTION 18. *When a Public Defenders Office has been created in any county under the provisions of this act, the board of supervisors of all other counties within the same judicial circuit court district as such county may, in lieu of providing for a separate Public Defenders Office, institute a cooperative program with the county in which the office of Public Defenders has been established under this act to obtain the services of the Public Defender and Assistant Public Defender of such county within the remaining counties of such judicial district.* To obtain such services, the board of supervisors of each such county within such judicial district shall adopt an order on their minutes requesting that the Public Defenders Office for the county in which the same has been established shall serve as Public Defender and Assistant Public Defender for all the counties of such judicial district. *On all of the counties within such judicial district adopting such an order it shall be the duty of the Public Defender and the Assistant Public Defender to furnish their services to all counties within such judicial district.* In the event such a cooperative program is instituted within any judicial district then there shall be levied and taxed as additional costs in each case in which there is a conviction for a criminal offense in all courts of the cooperating counties not having established the offices of Public Defenders the sum of Three Dollars ($3.00), which sum shall be paid by the various courts of each such county into the county treasury of such county and which sum shall be remitted by the county treasurer of each such county to the general fund of the county having created the office of Public Defenders under the provisions of this act.

SECTION 19. If any provision of this act or the application of such provision to any person, body or circumstance shall be held invalid, the remainder of this article or the application of such provision to persons, bodies or circumstances other than those concerning which it shall have been held invalid shall not be affected thereby.

SECTION 20. In the event of the enactment of legislation establishing a state-wide program of Public Defenders for each of the several judicial circuit court districts of the State of Mississippi, then the board of supervisors of such county may by resolution declare the offices of Public Defender created by this bill to be vacated.

SECTION 21. This act shall take effect and be in force from and after January 1, 1969.

APPENDIX III

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 178

AN ACT TO PROVIDE FOR A SYSTEM OF PUBLIC DEFENDERS; TO PROVIDE FOR THE SELECTION, QUALIFICATIONS, TERM OF OFFICE, DUTIES AND COMPENSATION OF SUCH PUBLIC DEFENDERS; TO AMEND SECTION 2505, MISSISSIPPI CODE OF 1942, RECOMPILED, AS AMENDED; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. *Public defender; election; term of office.* There is hereby created and established a system of public defenders in the State of Mississippi. There shall be a public defender for each of the circuit court districts. The public defender shall be elected at the 1971 general election by the qualified electors of their respective circuit court districts as other State officials are elected and shall serve for a term of four (4) years, and until their successors are elected and qualified. The senior circuit judge of each circuit court district shall make an interim appointment until such general election.

SECTION 2. *Qualifications of public defender.* The public defender shall possess the same qualifications as are provided by law for the office of district attorney.

SECTION 3. *Disabilities of public defender.* The public defender shall be subject to the same restrictions and disabilities as are provided by law for the office of district attorney.

SECTION 4. *Performance of duties and compensation of public defender.* The public defender shall devote his full time to the performance of his official duties and his compensation shall be in the same amount and payable in the same manner as is provided by law for the office of a full-time district attorney.

SECTION 5. *Assistant public defenders in certain districts.* In any circuit court district now or hereafter having a population of not less than one hundred thousand (100,000) and not more than two hundred thousand (200,000), according to the latest Federal census, there shall be one (1) assistant to the public defender; in any circuit court district now or hereafter having a population of not less than two hundred thousand (200,000) and not more than three hundred thousand (300,000), according to the latest Federal census, there shall be two (2) assistants to the public defender; and in any circuit court district now or hereafter having a population of not less than three hundred thousand (300,000) and not more than four hundred thousand (400,000), there shall be three (3) assistants to the public defender. Said assistants, including any successor or successors, shall be appointed by the public defender with the approval of the senior circuit judge of said district. Said assistants shall have been duly admitted to practice before the Mississippi Supreme Court for at least one (1) year and shall otherwise possess the same qualifications and shall be subject to the same disabilities and restrictions as are provided by law for the public defender and shall have the power and authority, under the direction and supervision of the public defender, to perform all of the duties required of that office. Said assistants may be removed at the discretion of the duly elected and acting public defender, or for cause by the senior circuit judge of said district. The salary of each of said assistants shall be Eight Thousand Five Hundred Dollars ($8,500.00) per annum, payable in the same manner as is the salary of the public defender. In such districts neither the public defender nor any assistant public defender shall engage in any private practice of law.

SECTION 6. *Duties of public defender.* The public defender shall represent any person who is determined to be indigent as provided in this act, who is under arrest for, or is charged with, a crime as defined by Section 8 of this act, if such a person requests such representation or if the court, on its own motion, so orders and such person does not knowingly and understandingly waive the opportunity to be so repre-

sented. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record.

The public defender may, with the consent of the trial court, but without compensation by the State, accept the voluntary services of members of the Mississippi Bar in good standing in the defense of an indigent person.

SECTION 7. *Determination of indigency.* The determination of the indigency of any accused person shall be made by the court in an ex parte proceeding and may be done at any stage of the proceedings. The public defender shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel for his own defense.

If the trial court shall determine and adjudge, within one (1) year after the determination of indigency, that any accused was erroneously or improperly determined to be indigent the district attorney may, in the name of the State, proceed by suit at law against such accused for the reasonable value of the services rendered to the accused and including all costs paid by the State or county in his behalf. Any amount recovered shall be deposited in the general revenue fund to the account from which the expenses of the office of public defender are paid.

SECTION 8. *Definition of crime.* For purposes of this bill a "crime" shall mean a felony or a misdemeanor the penalty for which is a jail sentence which may exceed ninety (90) days.

SECTION 9. *Employment of clerical help and other staff; payment for office equipment and expense; mileage; method of payment.* The public defender may employ a secretary, who shall not be related to such public defender by blood or marriage, at an annual salary not to exceed Four Thousand Eight Hundred Dollars ($4,800.00) payable in monthly installments; each county in the court district shall pay the portion of such salary as is determined by the ratio which the number of weeks of court in the county bears to the total number of weeks of court in the district, and such payments shall be made from the county general fund directly to said secretary. The public defender may employ such other clerical help and investigators as funds available may permit and as otherwise provided by law.

The boards of supervisors of the counties of the district shall provide suitable office space for the public defender at a town to be selected by the public defender. Upon itemized statements submitted by the public defender to the senior circuit judge and allowed and ordered by him, the several counties of the district shall pay the reasonable expense of office equipment for the public defender's office, and the reasonable

expense for office space and supplies, telephone service, postage and miscellaneous expense in the same manner as provided above for the payment of the salary of the secretary.

In each district the public defender's office shall receive a travel allowance of Seven Cents (7¢) per mile for each mile traveled by either the public defender or his assistants, or both, in the necessary performance of the duties thereof, not to exceed One Hundred Fifty Dollars ($150.00) per month. Such travel allowance shall be paid from State funds appropriated for such purposes, upon the sworn statement of the public defender itemizing such mileage submitted to and allowed and ordered by the senior circuit judge.

Any member of the bar in good standing may register his availability with the public defender of each district for acceptance of assignments to represent insolvent defendants in accordance with the provisions of Section 12 of this act.

SECTION 10. *Expenditures for public defender's office.* All payments for the salary of the public defender and the necessary expenses of his office, including salaries of his assistants and staff, shall be considered as being for a valid public purpose. The salary and necessary travel expenses of the public defender and his assistants shall be paid from State funds as appropriated by the Legislature.

SECTION 11. *Services other than counsel.* Upon finding in an ex parte proceeding that investigative, expert or other services are necessary to an indigent defendant as determined under this act, the court may authorize the public defender or assigned counsel to obtain the services on behalf of the defendant. The court shall determine reasonable compensation for the services and direct payment out of the general fund of the county, to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of Three Hundred Dollars ($300.00), for only one (1) defendant in any one (1) case.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

SECTION 12. *Conflict of interests; appointment of counsel.* The court shall appoint separate counsel for defendants who have such conflicting interests that they all cannot be properly represented by the public defender, or when other good cause is shown. If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial

payment for the representation, he may terminate the appointment of counsel or authorize payment as provided by Section 13 of this act, as the interests of justice may dictate.

SECTION 13. *Compensation of appointed counsel.* An attorney appointed pursuant to Section 12 of this act shall, at the conclusion of his representation be compensated at a rate of Fifteen Dollars ($15.00) per hour for time reasonably expended in such representation, and shall be reimbursed for expenses reasonably incurred. Where a defendant is charged with one or more crimes as defined by Section 8 of this act, compensation in excess of expenses shall not exceed Five Hundred Dollars ($500.00) for all such representation, including that related to an appeal or other postconviction procedure, except in extraordinary circumstances.

Such compensation and reimbursement of expenses shall be fixed by the circuit court and shall be paid out of the general fund of the county.

Each claim for compensation and reimbursement of expenses shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursements or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the defendant for whom he is assigned without approval of the court as herein provided.

SECTION 14. *Lien created on defendant's property.* There is hereby created a lien, enforceable as hereinafter provided, upon all property, both real and personal, then owned or thereafter acquired, of all persons who receive any assistance from any public defender or appointed counsel or other services provided by this act. Such assistance shall constitute a claim against the recipient and his estate, in an amount to be determined by the court in which such assistance was rendered and a copy of such claim shall be furnished to the recipient. Immediately after such assistance is rendered and upon determination of the value thereof by the court, a statement of claim showing the name and the residence of the recipient shall be filed for record in the office of the clerk of the circuit court in the county where the recipient resides and in each county in which such recipient then owns or later acquires any property. Such lien shall have the same force and effect and shall be enforced by the sheriff of the county in the same manner as liens for State ad valorem taxes are enforced and the proceeds of such enforcement shall first be utilized to reimburse the county for any expenditures made under this act and the balance, if any, shall be deposited in the

General Fund of the State of Mississippi to defray the costs of the public defender system. The lien herein created shall be a continuing obligation until satisfied by payment in full.

SECTION 15. *Acceptance of gifts and services.* Subject to the prior approval of the trial court judge, the public defender may accept services from, or contract with, appropriate State agencies for the purpose of rendering expert services or legal aid to indigent persons and for the purpose of studying, surveying and reporting on the need, use and availability of such aid in the State of Mississippi. The public defender or appointed counsel, with the concurrence of the trial court judge, may accept the assistance of students of any accredited school of law participating in any training program sponsored by such school.

SECTION 16. *Records.* Each public defender, until otherwise provided by law, shall each month record the following information for the preceding month:

(1) The number of indigent accused persons and defendants under indictment served by him;

(2) The number of trials, appearances and hearings on indigent accused persons and defendants provided for in this act and attended by him;

(3) The place of each such service or attendance, the amount of time expended in such service or attendance, and the nature thereof;

(4) The specific felony or misdemeanor alleged to have been committed by such accused person or defendant.

Each such monthly record shall, before the first day of the next succeeding month, be transmitted by the public defender to the Executive Secretary of the Commission on Budget and Accounting, who shall retain the same in his office and deliver the same to the Legislature of the State of Mississippi at the next succeeding regular session thereof; and such Executive Secretary shall certify the receipt of such record to the Auditor of Public Accounts; and in the absence of such certificate the Auditor of Public Accounts shall issue no pay warrant nor payment of travel expense to the public defender failing to forward the record herein provided for.

SECTION 17. Section 2505, Mississippi Code of 1942, Recompiled, as amended, is amended to read as follows:

2505. *In capital cases copy of indictment and special venire served to be given.* Any person indicted for a capital crime shall, if demanded by him by motion in writing before the completion of drawing of the

special venire, have a copy of the indictment and list of the special venire summonded for his trial delivered to him or his counsel at least one (1) entire day before said trial.

SECTION 18. *Savings clause.* If any provision of this act or the application of such provision to any person, body or circumstance shall be held invalid, the remainder of this article or the application of such provision to persons, bodies or circumstances other than those concerning which it shall have been held invalid shall not be affected thereby.

SECTION 19. *Effective date.* This act shall take effect and be in force from and after July 1, 1968.

BREAK DOWN ON H. B. NO. 178—SET UP AND COST

		Population		
1.	Alcorn	25,282	1 PD	$13,500
	Itawamba	15,080	1 APD	8,500
	Lee	40,589		
	Monroe	33,953		
	Pontotoc	17,232		
	Prentiss	17,949		
	Tishomingo	13,889		
		163,974		$22,000
2.	Stone	7,013	1 PD	$13,500
	Hancock	14,039	1 APD	8,500
	Harrison	119,489		
		140,541		$22,000
3.	Tippah	15,093	1 PD	$13,500
	Union	18,904	1 APD	8,500
	Benton	7,723		
	Marshall	24,503		
	Lafayette	21,355		
	Calhoun	15,941		
	Chickasaw	16,891		
		120,410		$22,000
4.	Washington	78,638	1 PD	$13,500
	Humphreys	19,093	2 APD	17,000
	Sunflower	45,750		
	Holmes	27,096		
	Leflore	47,142		
		217,719		$30,500

5.	Winston	19,246	1 PD	$13,500
	Grenada	18,409	1 APD	8,500
	Choctaw	8,423		
	Attala	21,335		
	Montgomery	13,320		
	Carroll	11,177		
	Webster	10,580		
		102,490		$22,000
6.	Jefferson	10,142	1 PD	$13,500
	Amite	15,573		
	Wilkinson	13,235		
	Adams	37,730		
	Franklin	9,286		
		85,966		$13,500
7.	Hinds	187,045	1 PD	$13,500
	Madison	32,904	2 APD	17,000
	Yazoo	31,653		
		251,602		$30,500
8.	Rankin	34,322	1 PD	$13,500
	Neshoba	20,927	1 APD	8,500
	Newton	19,517		
	Leake	18,660		
	Scott	21,187		
		114,613		$22,000
9.	Claiborne	10,845	1 PD	$13,500
	Issaquena	3,576		
	Sharkey	10,738		
	Warren	42,206		
		67,365		$13,500
10.	Wayne	16,258	1 PD	$13,500
	Lauderdale	67,119	1 APD	8,500
	Clarke	16,493		
		115,128		$22,000
11.	Bolivar	54,464	1 PD	$13,500
	Coahoma	46,212	1 APD	8,500
	Quitman	21,019		
	Tunica	16,826		
		138,521		$22,000

12.	Forrest	52,722	1 PD	$13,500
	Perry	8,745		
		61,467		$13,500
13.	Covington	13,637	1 PD	$13,500
	Jasper	16,609		
	Simpson	20,454		
	Smith	14,303		
		65,003		$13,500
14.	Copiah	27,051	1 PD	$13,500
	Lincoln	26,759	1 APD	8,500
	Pike	35,063		
	Walthall	13,512		
		102,385		$22,000
15.	Jefferson Davis	13,540	1 PD	$13,500
	Marion	23,293		
	Lawrence	10,215		
	Pearl River	22,411		
	Lamar	13,675		
		83,134		$13,500
16.	Clay	18,933	1 PD	$13,500
	Kemper	12,277	1 APD	8,500
	Noxubee	16,826		
	Lowndes	46,639		
	Oktibbeha	26,175		
		120,850		$22,000
17.	Yalobusha	12,502	1 PD	$13,500
	DeSoto	23,891	1 APD	8,500
	Panola	28,791		
	Tate	18,138		
	Tallahatchie	24,081		
		107,403		$22,000
18.	Jones	59,542	1 PD	$13,500
		59,542		$13,500
19.	George	11,098	1 PD	$13,500
	Greene	8,366		
	Jackson	55,522		
		74,986		$13,500

19 PD @ $13,500	$256,500
14 APD @ $8,500	119,000
TOTAL Salaries	$375,500
Travel expense	34,200
	$409,700

FEDERAL INCOME TAXATION OF TIMBER

*Hampton Stennis Little, Jr.**

I. Introduction

In 1944 Congress responded to certain inequities in the taxation of timber by passing § 117(k) of the Internal Revenue Code of 1939, the predecessor to § 631 of the Internal Revenue Code of 1954. The ostensible purpose of the legislation was to allow capital gains treatment on certain types of timber sales. The effect of the section, however, was much broader; today the timber industry as a general rule enjoys long-term capital gain treatment on all sales of timber including sales where the timber is held primarily for sale to customers in the ordinary course of the person or company's trade or business.

While the statutory language of § 631 read in the light of other sections of the Code is relatively simple, the section nevertheless has produced extensive litigation, many questions and continuing uncertainties. This article covers the legislative background of § 631 and the methods that can be employed to achieve long-term capital gains treatment on timber sales under such section and otherwise.

In addition, timber depletion and the capitalization and deduction of expenditures will be covered briefly.

II. The Statutory Provisions In General

Section 631(a)[1] in conjunction with § 1231 provide for capital gains treatment on a hypothetical sale of timber by the owner of such timber to himself. Such gain is recognized to the extent of the difference between the adjusted basis for depletion in the hands of the owner at the date of cutting and the fair market value of such timber as of the first day of his taxable year.

Section 631(b) in conjunction with § 1231 allows an owner of standing timber to dispose of the timber at capital gains rates by providing that where an owner of timber held for more than six months disposes of it "under any form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from the disposal of the timber and the

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[1] All references are to the Internal Revenue Code of 1954, unless otherwise indicated.

adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber." As indicated, § 631 does not in itself provide capital gains treatment, but such treatment is actually allowed by § 1231.

If a timber owner does not qualify under § 631(a) or § 631(b), he may, nevertheless, achieve capital gains benefit under § 1221[2] (formerly § 117(a) (1) of the 1939 Code), or under the general provisions of § 1231. Under § 1221 if an owner holds an interest in a tract of standing timber as an investment and it is neither property used in his trade or business nor property held primarily for sale to customers in the ordinary course of his trade or business, it can qualify as a capital asset.

Section 1221 provides that the term "capital asset" includes all property held by the taxpayer with certain exceptions, including:

> (1) property that would be included properly in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; and
>
> (2) property used in his trade or business of a character which is subject to depreciation.

Section 1231 provides the rules for the treatment of property used in the taxpayer's trade or business, and although § 1221 excludes property used in the trade or business from capital gains, § 1231 operates to grant capital gains to such property. Again, however, property that would be includable in the inventory of the taxpayer, if on hand at the close of the taxable year, and property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business are generally excluded[3] as they were in § 1221.[4] Section 1231(b) (2) follows to treat timber to which § 631 applies as "property used in the trade or business." The Regulations and Revenue Service[5] interpret § 1231(b) (2) to mean that if § 631 applies, then such property is property used in the trade or business even though such property is of the type that was

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[2] Sections 1221 and 1231 are, in general, the sections that give preferential capital gains treatment under the Internal Revenue Code.

[3] Section 1231(b)(1).

[4] Sometimes § 1231 has a very useful advantage over § 1221 since it permits ordinary loss deductions where transactions in such property result in a net loss, and capital gain treatment if there is a net profit.

[5] Rev. Rul. 57-90, 1957-1 CUM. BULL. 199; Treas. Reg. § 1.1231-1 (1957), T.D. 6253, 1957-2 CUM. BULL. 547, *as amended* T.D. 6394, 1959-2 CUM. BULL. 186, and T.D. 6841, 1965-2 CUM. BULL. 200.

includable in the inventory of principally held for sale to customers in the ordinary course of his trade or business.[6]

III. Legislative Background and Early Development of Section 631

Prior to 1943, when the owner of timber granted to another the right to cut and remove his timber, preserving a royalty interest to himself, contingent upon the amount of timber cut, the transaction was viewed as a lease or cutting contract analogous to the oil and gas situation[7] and generally resulted in ordinary income treatment of the royalties received.[8] In addition, when an owner cut timber for use in his own business, since there was no sale or exchange, the difference between his cost basis in the timber and the fair market value of the timber at the time of cutting could not be classified as capital gains. When the cut timber or wood product was sold, this difference was ordinary income. Consequently, it became advantageous to sell the timber and then buy it back from the purchaser.

It was apparently to alleviate this problem that Congress passed § 117(k) (1) and (2) of the Revenue Code of 1939 (the predecessor to § 631). The Senate Finance Committee stated, in part, as follows:

> Your committee is of the opinion that various timber owners are seriously handicapped under the Federal income and excess profits tax laws. The law discriminates against taxpayers who dispose of timber by cutting it as compared with those who sell timber outright. The income realized from the cutting of timber is now taxed as ordinary income at full income and excess profits tax rates and not at capital gain rates. In short, if the taxpayer cuts his own timber he loses the benefit of the capital gain rate which applies when he sells the same timber outright to another. Similarly, owners who sell their timber on a so-called cutting contract under which the owner retains an economic interest in the property are held to have leased their property and are therefore not accorded under present law capital-gains treatment of any increase in value realized over the depletion basis.[9]

It is thus clear that under § 117(k) (1) and (2), Congress in-

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[6] It is not altogether clear that this interpretation is what Congress *originally* intended in 1944 when the legislation was passed. This reading, of course, gives capital gains to the entire timber industry even on ordinary business income, provided the requirements of § 631 are met. See Legislative Background and Early Development, *infra*.

[7] *See, e.g.*, Palmer v. Bender, 287 U.S. 551 (1933); Burnet v. Harmel, 287 U.S. 103 (1932).

[8] Commissioner v. Boeing, 106 F.2d 305 (9th Cir. 1939), *cert. denied*, 308 U.S. 619; *cf. G.C.M.* 22730, 1941-1 Cum. Bull. 214.

[9] S. Rep. No. 627, 78th Cong., 1st Sess. 25 (1943).

tended for capital gains to result under the two situations mentioned in the Committee Report: (1) Where the taxpayer would have received capital gains treatment if he had made an outright sale (*i.e.*, where he did not hold the timber primarily for sale to customers in the ordinary course of his business and the timber would not have been includable in the inventory of the taxpayer) but, instead, cut the timber himself for use in his trade or business, and (2) where the taxpayer entered into a cutting contract on timber that would have brought capital gains treatment if he had made an outright sale (*i.e.*, where he did not hold the timber primarily for sale to customers in the ordinary course of his business and the timber would not have been includable in the inventory of the taxpayer).

It is not so clear, however, that Congress intended in 1944 to extend capital gains treatment to the timber industry as a whole, since presumably many owners, including numerous corporations and partnerships, did hold timber primarily for sale to customers or as a part of their inventory. Consequently, these owners would not have received capital gains in the first place on the two inequitable situations that Congress attempted to reach. As we have seen, however, the effect of the section was to include a full sweep of the timber industry by virtue of the Treasury Regulations' first interpretation of § 117(j) of the 1939 Code (the predecessor to § 1231) and by a subsequent Revenue Ruling.[10]

The technical explanation to the Senate Finance Committee Report states:

> Thus gain or loss arising from the cutting of timber with respect to which an election has been made under section 117(k)(1), and from timber which has been disposed of, as provided in section 117(k)(2), shall be considered, *or shall not be considered,* as gains or losses from the sales or exchanges of capital assets under the provisions of section 117(j), depending upon the operation of such section to the case of the taxpayer.[11] (emphasis added).

The Senate Finance Committee therefore seems to clearly state that the cutting of the timber pursuant to § 117(k) may or may not be considered as the sale or exchange of a capital asset depending upon the

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[10] This writer wishes to emphasize that the need for timber conservation may well justify the treatment to the entire industry provided, of course, the provisions of § 631 are met; and this is apparently the feeling of the present Congress. The President's 1963 Tax Message in effect recommended the elimination of substantially all capital gains in timber, except for a $5,000 limitation on individuals. These proposals were not acceptable to the Congress.

[11] S. REP. No. 627, *supra* note 9, at 58.

application of § 117(j) to the individual taxpayer. This would seem to indicate that the exclusions that were contained in § 117(j) concerning inventory and timber principally held for customers in the ordinary course of its business would also be applicable to the newly passed legislation.

Moreover, the Senate Floor discussion of the President's veto[12] suggests that it was in the mind of most of the supporters of the bill to give capital gains treatment only in the two inequitable situations mentioned previously and not to grant capital gains to the entire industry. At one point in the Floor discussion, following the President's veto, Senator Barkley stated:

> And a company which is in the lumber business, buying timber year by year and selling it year by year, of course, accounts for any profits as an annual income. It seems to me that is an entirely different proposition from that of a man who has over a period of half a century developed a forest or tract of timber, and then either decides to sell it as an entirety, or to cut it and market it himself. If he sells it he gets a capital gain, but if he cuts it and markets it piece by piece or by the thousand feet, under the present law he is taxed on income and not as a capital gain. . . .[13]
>
> Suffice it to say that under the present law the owners of timberland may sell it to a lumber or milling company or to anyone else who moves in upon it, cuts the timber and sells it, and are allowed to pay taxes on the basis of the capital gain. The person who buys, cuts and markets the timber pays taxes on an annual income basis, because he is in that business. . . .[14]

Section 117(j) of the 1939 Code (now § 1231) as passed in 1944 was implemented by the Treasury Regulations,[15] which took the position that transactions qualifying under § 117(k) (1) and (2), for the taxable years beginning after December 31, 1943, would be treated as a gain or loss from the sale or exchange of capital assets held for more than six months regardless of whether such timber properly would be includable in the inventory of the taxpayer if on hand at the close of the tax year and regardless of whether such timber was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. The Treasury Regulations thus gave capital gains treatment

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[12] 90 Cong. Rec. 1949 (1944).

[13] *Id.* at 1950. As pointed out previously, everybody in the timber business would not have received a capital gain at the time of the Senator's discussion.

[14] *Id.* at 1965. But as will be shown later, § 631(a) gives the lumber owner capital gains in the very situation that Senator Barkley stated they would receive ordinary income.

[15] Treas. Reg. 111, § 29.117-7, T.D. 5394 (1944).

to both dealers and non-dealers provided they could meet the provisions of § 117(k) (1) and (2).

The Treasury, however, apparently had certain reservations about its position because in 1953 there was a revision of § 29.117-7 of the Regulations[16] whereby the above quoted portion of the Regulations was deleted; and the Regulations no longer contained the part which exempted § 117(k) transactions from running the gauntlet of the test of § 117(j), *i.e.*, whether the taxpayer held the timber primarily for sale to customers or whether such timber would have been includable in the inventory of the taxpayer.

The case of *Ah Pah Redwood Co. v. Commissioner*[17] aptly demonstrates the confusion of the legislation in the beginning. In that case, the taxpayer acquired certain California timberlands and later in the same month allowed an affiliate company to start cutting timber and to pay the taxpayer five dollars per thousand feet as such timber was removed. The cutting continued under the oral arrangement until about three years later when the taxpayer and its affiliate company entered into a formal written contract for the sale of the remaining timber. The taxpayer treated its income received under the oral contract from April, 1948, through 1949, as capital gains under § 117(k) (2). The Tax Court held that § 117(k), by virtue of the limitations of § 117(j), did not apply to timber held for sale in the ordinary course of business. While the case was on appeal, this holding was repudiated by the Internal Revenue Service in a ruling that stated:

> In the case of the disposal of timber, held for more than six months prior to such disposal, by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber, pursuant to the provisions of § 631(b) of the Internal Revenue Code of 1954, the gain or loss on such disposal is subject to tax treatment provided by section 1231 regardless of the nature of the taxpayer's business or the purpose for which the timber is held.[18]

In the case of *Wineberg v. Commissioner*,[19] the United States Court of Appeals for the Ninth Circuit in answering an obviously erroneous argument of the taxpayer to the effect that if § 117(k) did not apply he was entitled to capital gains even though he held the property primarily to sell to customers, stated concerning the Congressional intent of § 117(k) as follows:

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[16] T.D. 5970, 1953-1 CUM. BULL. 183.

[17] 251 F.2d 163 (9th Cir. 1957), *rev'g in part and remanding* 26 T.C. 1197 (1956), *on remand*, P-H Tax Ct. Mem. ¶ 59,044 (1959).

[18] Rev. Rul. 57-90, 1957-1 CUM. BULL. 199.

[19] 326 F.2d 157 (9th Cir. 1963), *aff'g* P-H Tax Ct. Mem. ¶ 61,336 (1961).

> Senate Report No. 627 . . . indicates no intent to prefer timber dealers over dealers in other real property interests or in other commodities. The first paragraph of the quoted excerpt indicates concern solely with the inequality of treatment between a taxpayer who *cut* his own timber and then sold or used it, and one who merely sold the timber outright.
>
> The obvious intent in adding subsection (k), as indicated by a reading of the entire excerpt from Senate Report No. 627 . . . was *not* to eliminate existing exclusions as to *dealers* in timber, but to *equalize* the *treatment between* (1) *non-dealers* who *sold their timber outright,* and (2) *non-dealers* who *cut their own timber* and then sold or used it. Section 117(k) (2) was added to give the same treatment to *non-dealers* who sold timber to others under a lease or similar arrangement whereby they reserved an economic interest in the timber, as was given by Section 117(k) (1) to *non-dealers* who sold their timber outright.[20]

This would seem to be the correct interpretation of the meaning of Congress in 1944.[21]

In any event, however, it is clear today that if a timber dealer qualifies under § 631, he is entitled to capital gains treatment. Therefore, someone who sells timber today is entitled to capital gains treatment if he meets the provisions of § 631, notwithstanding the fact that he holds the timber primarily for sale to customers in the ordinary course of his business or whether such timber would be includable in his inventory. We will next examine the factors that are necessary for qualification under § 631.

IV. Securing Capital Gains Under Section 631

A. Section 631(a)

As shown above, § 631(a) in conjunction with § 1231 provides for capital gains treatment on a hypothetical sale of timber by the owner of such timber to himself. Such gain is recognized to the extent of the difference between the adjusted basis for depletion in the hands of the owner at the date of cutting and the fair market value of such timber as of the first day of his taxable year. In order to receive the benefit of this subsection of § 631, the taxpayer must comply with three requirements:

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[20] 326 F.2d at 165.

[21] The court made no attempt to explain, however, why the Treasury allowed dealers to become entitled to capital gains treatment under § 117(j). The language of § 1231 more clearly supports the Regulations interpretation than the language of its predecessor, § 117(j), since the special rule of §1231(b) (2) is structurally equal to the general rule of § 1231(b) (1).

(1) He must elect upon his return to take advantage of § 631(a).[22] The election must be made by the taxpayer in his income tax return for the taxable year for which the election is applicable, and such election cannot be made in an amended return for such year. The election in the return shall take the form of a computation under the provisions of §§ 631(a) and 1231. The election may be made with respect to any taxable year even though such election was not made with respect to a previous taxable year. The election shall be binding upon the taxpayer not only for the taxable year for which the election is made, but also for all subsequent taxable years, unless the Commissioner, on showing by the taxpayer of undue hardship, permits the taxpayer to revoke his election for such subsequent taxable years. In addition, if the taxpayer has revoked a previous election, such revocation shall preclude any further elections unless the taxpayer obtains the consent of the Commissioner.[23] The election shall apply with respect to all timber which the taxpayer has owned, or has a contract right to cut, for a period of more than six months prior to the beginning of the taxable year in which such timber is cut, irrespective of whether such timber or contract right was acquired before or after the election.[24] If a partnership is involved the election must be made by the partnership as a partnership return.[25]

(2) The taxpayer must cut the timber for use or for sale in his trade or business.[26] Of course, a taxpayer may employ an agent to cut such timber, but as will be shown later such cutter must be only an agent and cannot acquire a proprietary interest in the owner's timber.

(3) The taxpayer must have owned the timber or held a contract right to cut it for more than six months prior to the beginning of the taxable year in which it was cut.[27]

The only major problems have resulted from the third requirement. In order to have a "contract right to cut timber" within the meaning of § 631(a), a taxpayer must have a right to sell the timber cut under the contract on his own account, or to use such cut timber in his trade or business.[28] In the case of *Carlen v. Commissioner*,[29] the Tax Court was faced with a situation where a partnership (the taxpayer) had contracted to cut timber and to deliver it to mills designated by the land-

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[22] Treas. Reg. § 1.631-1(c) (1957).

[23] Treas. Reg. § 1.631-1(a) (3) (1957).

[24] Treas. Reg. § 1.631-1(a) (4) (1957).

[25] Section 703; Beilke v. Commissioner, P-H Tax Ct. Mem. ¶ 63,005 (1963). See the definition of a partnership for tax purposes in § 761.

[26] Treas. Reg. § 1.631-1(a) (4) (1957).

[27] Treas. Reg. § 1.631-1(a) (4) (1957); Treas. Reg. § 1.631-1(b) (1) (1957).

[28] Treas. Reg. § 1.631-1(b) (1) (1957).

[29] 20 T.C. 573 (1953), *aff'd*, 220 F.2d 338 (9th Cir. 1955).

owner, the Neuskah Timber Co. (hereinafter Neuskah). Neuskah was to pay the partnership the net cash return from the sale of the logs after the deduction of specified stumpage and service fees. The title and control of the logs were to remain with Neuskah until the logs were sold. The partnership claimed the benefit of the predecessor to § 631(a), which was § 117(k) (1). In rejecting the taxpayer's contention, the Tax Court stated:

> The statute speaks of the cutting of timber for sale by a taxpayer who has a right to cut such timber. To us this means that the taxpayer who would claim the benefit of the statute must be the one who has not only the right to cut but also the right to sell on his own account. . . . We agree with the Commissioner that the statutory language does not cover a taxpayer who cuts timber in which he himself has no proprietary interest which he can dispose of by sale.[30]

Apparently, quite a few timber owners prefer having their timber cut by independent contractors instead of by themselves even under circumstances where they intend to use the cut timber in their operations. For example, a timber owner might not wish to hire employees to cut his timber because of such bothersome problems as income tax withholding, social security, labor and accounting problems. Could a timber owner who desires to use the logs himself in his trade or business avoid this problem but yet receive capital gains treatment just the same under § 631(b)? As to the cutter, as noted, he must have a proprietary interest in the timber and must be able to sell on his account. If he has entered into an agreement with the timber owner to resell the logs to the owner, then presumably he would not have the necessary proprietary interest in such timber and consequently could not claim the benefit of § 631(a). If the cutter, however, enters into an understanding with the timber owner that he will resell the timber to the owner, but does not bind himself with a contract, then the issue is not so clear. In 1958, the Revenue Service stated as follows:

> If the circumstances are such that the grantor in fact takes for his own use or for sale on his own account, substantially all of the logs cut, whether or not in the exercise of a right in the form of option of purchase, the taxpayer-grantee will not be deemed to have an unrestricted right to sell the logs or to use them in his trade or business.[31]

In *United States v. Johnson*,[32] the taxpayer, a partnership, entered into a contract which gave it the right to cut and remove all merchant-

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[30] 20 T.C. at 578.

[31] Rev. Rul. 58-295, 1958-1 CUM. BULL. 249.

[32] 257 F.2d 530 (9th Cir. 1958).

able timber and to pay the owner for stumpage payments with an agreement to make increased payments if the market price of logs rose during the contract period. The contract provided that the partnership had the right, but not the obligation, to sell all logs to the landowner. However, all the sales were made to the landowner. The Revenue Service, pointing to some provisions of the contract that were inconsistent with the acquisition of title to the logs, denied the application of § 117(k) (1) of the Internal Revenue Code of 1939 § 631(a). Recognizing the inconsistency between some provisions of the contract and an arrangement giving the partnership title to the logs, the court nevertheless held for the taxpayer, stating:

> More significant than the use of these specific terms, however, is the provision of the contract which gave the partnership the option to dispose of the logs to the timber company, but no obligation to do so. Since the partnership was not required to dispose of any or all of the logs to the timber company, it must have been contemplated that it could dispose of them to others. This could not have been done unless the partnership actually had title to the logs, and dispositions to others would necessarily be sales. It follows that, under the contract, the partnership acquired title to the logs, and all dispositions of such logs, to the timber company or to others, must have been sales.[33]

In this situation the timber owner presumably would attempt to achieve capital gains under § 631(b), discussed *infra*, but if this type of arrangement with the cutter should fail to give the cutter the necessary proprietary interest, then it would seem to follow that there has not been a sale under § 631(b) since the cutter is merely an agent and there has not been a disposal within the meaning of the subsection. The timber owner would be in danger of losing the benefit of § 631(a) — that he could have obtained from the start — since presumably he did not elect such section but was claiming the benefit of § 631(b).[34]

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[33] *Id.* at 533-34.

[34] The question of whether the required proprietary interests exists has resulted in considerable litigation. For other cases holding for a proprietary interest, see Wirkkala v. United States, 181 F. Supp. 338 (W.D. Wash. 1960); Gilmore v. United States, 180 F. Supp. 354 (Ct. Cl. 1960); Lansing v. Commissioner, P-H Tax Ct. Mem. ¶ 64,082 (1964); Carpenter v. Commissioner, 36 T.C. 797 (1961), *acquiesced in*, 1962-1 CUM. BULL. 3; Shaffer v. Commissioner, P-H Tax Ct. Mem. ¶ 60,186 (1960); Stone v. Grandquist, 60-1 U.S. Tax Cas. ¶ 9148, 5 Am. Fed. Tax R.2d 304 (D. Ore. 1959); Pinkerton v. Commissioner, 28 T.C. 910 (1957), *acquiesced in*, 1958-1 CUM. BULL. 5. For other cases holding that the necessary proprietary interest did not exist, see Ellison v. Frank, 245 F.2d 837 (9th Cir. 1957), and Weyerhaeuser Co. v. United States, 66-1 U.S. Tax Cas. ¶ 9417, 17 Am. Fed. Tax R.2d 893 (W.D. Wash. 1966), *aff'd*, 395 F.2d 1005 (9th Cir. 1968) where the Ninth Circuit noted that the *owner* under the regulations did not have to possess an unrestricted right to sell or use the logs as is required for a taxpayer claiming a "contract right to cut". The court did not take note of the requirement of the reg-

The gain or loss on the hypothetical sale is recognized in an amount equal to the difference between the adjusted basis for depletion of the timber cut and the fair market value of such timber as of the first day of the taxpayer's taxable year. For example, if a timber owner during the year 1967 cuts timber having an adjusted basis (his cost less depletion previously taken) of forty dollars per thousand board feet and a fair market value (measured January 1, 1967) of seventy dollars per thousand board feet, then the difference is considered capital gain and the cut timber acquires a new basis of seventy dollars. If the owner subsequently converts the timber into a wood product incurring twenty dollars in cost and sells the product for $120, there is thirty dollars of ordinary income ($120 less seventy dollars basis less twenty dollars manufacturing costs). Assuming instead the owner marketed the logs himself, and was able to sell the logs for eighty-five dollars incurring five dollars selling expenses, the ordinary income to be reported would be ten dollars (eighty-five dollars less seventy dollars less five dollars). The fair market value as of the first of the year is ascertained in the same manner as any other fair market value determination, *i.e.*, what a willing buyer would pay a willing seller, both being aware of all the facts and neither being compelled to buy or sell. This hypothetical gain is a gain or loss subject to § 1231 and is, therefore, property used in the trade or business of the taxpayer.[35]

For the purposes of § 631(a), the timber shall be considered cut at the time when in the ordinary course of the business the quantity of timber felled is first definitely determined.[36] Of course, the date that

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ulations that the taxpayer must cut the timber for use or for sale in his trade or business (Treas. Reg. § 1.631-1(a) (4) (1957)). The court accepted the contention that one of the two parties claiming the benefit of § 631(a) under the facts of that case must have the benefit of the section. This, of course, would not be true in every case since some arrangements might forfeit the benefits of the section to all of the parties involved.

[35] As already discussed, however, the two general exclusions applicable to § 1231 property do not apply to transactions qualifying under § 631; consequently, a timber dealer may receive capital gains.

[36] Treas. Reg. § 1.631-1(a) (2) (1957). Also see Rev. Rul. 58-135, 1958-1 CUM. BULL. 519, where it is stated that since "it has been the general practice in the timber industry to determine the quantity of the timber cut during a taxable year for depletion purposes when in the process of exploitation, the timber is first actually measured. This determination usually takes place in the log landing, river bank or at the mill and also serves as the point where the quantity of logs is inventoried, since it is generally impractical to obtain a reasonably accurate measurement of quantity at the time the timber is felled. This is due partly to the fact that timber, when first felled, cannot be turned for inspection of defects and damage in falling, and the additional fact that the logs may be lost, damaged or destroyed in the course of handling, transportation and dumping."

the fair market value is determined may in some cases be a year subsequent to the actual date of cutting.

Moreover, a taxpayer might have taxable income before he has any income with which to pay the tax. This is true since the taxable event for § 631(a) is the cutting of the timber by the taxpayer and the taxpayer, in fact, may not receive any proceeds from the wood products, into which he converts the timber, or any proceeds from the sale of logs until a subsequent taxable year.

B. Section 631(b)

Whereas § 631(a) affords capital gains treatment to owners who cut their own timber and later sell it or use it in their trade or business, § 631(b) permits capital gains treatment where there is

> disposal of timber held for more than six months before such disposal, by the owner thereof, under any form or type of contract by virtue of which such owner retains an economic interest in such timber, [and] the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof, shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber. . . .

Since capital gains are an exception to ordinary income treatment, the Revenue Service and the courts have required strict compliance with this statutory language.[37] As a result, as a general rule, § 631 must be observed in its entirety to receive the favorable tax rates. There are four specific requirements of this subsection, each of which has produced its own problems.

1. *The taxpayer must either own, be a sublessor, or be a holder of a contract to cut timber.* — Section 631(b) states that the disposal of timber under subsection (b) must be "by the owner thereof." An owner of timber is defined in the last sentence of § 631(b) to mean any person who owns an interest in timber, including a sublessor, and a holder of a contract to cut timber. In order to hold an interest in the timber within the meaning of § 631(b)[38] such owner must have a right to cut timber for sale on his own account or for use in his trade or business.

2. *The taxpayer must have owned the timber for more than six months before disposal.* — As in other capital gains situations the taxpayer must "own" the timber for more than six months before disposal.

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[37] It would seem that § 631(a) has been more liberally construed by the courts than § 631(b).

[38] Treas. Reg. § 1.631-2(e) (2) (1957); Schnitzer v. United States, 22 Am. Fed. Tax R.2d 5972, F. Supp. (Ore. 1969).

It has been held by the Revenue Service that a taxpayer who acquired timber on December 31, 1962, and still owned it at the beginning of his taxable year which began on July 1, 1963, had owned such timber for a period of more than six months before the beginning of such taxable year for the purposes of § 631(a).[39]

In addition, the Revenue Service has ruled that the holding period for timber held by a taxpayer under a cutting contract carries over when the timber so held is acquired by outright purchase by the same taxpayer.[40] The Service has also stated that for reorganizational purposes, the holding period for the acquiring corporation includes the period during which such timber was held by the transferor.[41]

3. *The taxpayer must in fact dispose of the timber under a contract.* — The requirement that a taxpayer dispose of his timber under a contract has caused more problems than any of the other requirements of § 631 or its predecessor. In order to understand this requirement, several cases must be examined in detail. The most significant case is *Ah Pah Redwood Co. v. Commissioner.*[42] In October, 1947, the taxpayer, Ah Pah Redwood Co. (hereinafter Redwood) acquired certain California timberlands and later in the same month permitted the Coast Redwood Co. (hereinafter Coast) to begin cutting timber under an oral agreement which required Coast to pay a specified price per thousand board feet as the timber was cut. The cutting continued under this oral agreement until January, 1959, at which time Redwood and Coast entered into a written contract for the sale of the remaining timber. The taxpayer contended that the oral arrangement of October, 1947, was not a disposal within six months after acquiring the timber, on the grounds that the arrangement was unenforceable under California law. It also argued that the cutting license did not develop into a contract until each individual tree was cut. The Revenue Service, on the other hand, contended that the October, 1947, arrangement constituted a disposal[43] before the timber had been held by Redwood for more than six months. Consequently, the taxpayer had not held the timber for the required

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[39] Rev. Rul. 66-6, 1966-1 CUM. BULL. 160. *See also* Rev. Rul. 66-7, 1966-1 CUM. BULL. 188, where the Revenue Service ruled that a capital asset which is acquired on the last day of any calendar month, regardless of whether the month has thirty-one days, must not be disposed of until on or after the first day of the seventh succeeding month of the calendar in order to have been held for more than six months.

[40] Rev. Rul. 61-57, 1961-1 CUM. BULL. 243.

[41] Rev. Rul. 55-352, 1955-1 CUM. BULL. 372.

[42] *Supra* note 17.

[43] As we shall see, this position of the Revenue Service has generally been reversed.

six-month period. The Tax Court held [44] that the cutting arrangement with Coast did constitute a disposal since the October, 1947, oral arrangement with Coast was removed from the California statute of frauds through partial performance by Coast, thereby constituting an enforceable contract.[45] The United States Court of Appeals for the Ninth Circuit, however, reversed the Tax Court and held that a disposal of the timber within six months of its acquisition did not take place within the meaning of § 117(k)(2) since the oral arrangement with Coast did not constitute a contract. In short, the oral cutting arrangement placed Coast under no obligation.[46] The court of appeals, however, stated that the transaction still did not qualify under § 117(k)(2) because the taxpayer (Redwood) at the point of disposal — cutting — did not retain an economic interest in the timber.[47]

The confusion brought on by § 117(k) was further demonstrated by the fact that in the Tax Court neither the Revenue Service nor the taxpayer's counsel brought to the attention of the Tax Court that, notwithstanding the inapplicability of § 117(k), the taxpayer still could attempt to show that the timber was a capital asset in his hands. This issue was finally raised in the court of appeals and was remanded to the Tax Court for a determination of this issue.[48]

Another important case is *Ray v. Commissioner*.[49] In the *Ray* case the taxpayer and the Mengle Co. contracted to sell all the pine trees standing on the taxpayer's land. Forty thousand (40,000) cords of pulpwood were to be cut under this contract at the prevailing market price and Mengle made an advance of $40,000. The taxpayer was to cut and remove the timber; Mengle was to have the right to cut only if the taxpayer defaulted. The cutting was done by the taxpayer's sons, and he was required to pay taxes on the timber and protect it from a fire and theft. The taxpayer claimed the benefit of § 117(k) (2) (§631 (b)), and alternatively contended that capital gains should result under § 117(j)

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[44] 26 T.C. 1197 (1956).

[45] As noted earlier (Legislative Background and Early Development of § 631), as additional grounds for the denial for the application of § 117(k) (2), the Tax Court stated that such section could not apply to timber which is held for sale in the ordinary course of business. As previously shown, the Revenue Service disavowed the Tax Court's statement in this regard.

[46] Thus agreeing with the taxpayer's argument in the Tax Court.

[47] The economic interest requirement will be discussed *infra*.

[48] The Tax Court, at this time obviously bewildered by the turn of events, held that the taxpayer did not hold the timber primarily for sale to customers in the ordinary course of its business even though when the case was originally before the court, it had been held that as an additional ground for the inapplicability of § 117(k) (2), the taxpayer had held the timber primarily for sale to customers.

[49] 283 F.2d 337 (5th Cir. 1960), *aff'g per curiam*, 32 T. C. 1244 (1959).

(§ 1231). The Tax Court held that § 117(k)(2) was not applicable since the taxpayer had not surrendered his cutting rights, and consequently, this did not constitute a disposal within the meaning of that section. The court stated:

> Analysis of the legislative history and the language of subsection (k)(1) and (2), indicates that Congress intended to limit the benefits of section 117(k)(2) to those transactions where the timber owner surrendered to another his cutting rights to the timber involved, retaining an economic interest usually in the nature of a lease or royalty interest. The most common instance of such disposal of timber with an economic interest retained is where it is sold on the stump by the thousand board feet, being measured after cut, and the owner is paid an amount on a per unit cut basis. See *Boeing v. United States*, 98 F. Supp. 581 (Ct. Cl. 1951); L.D. Wilson, 26 T.C. 474.[50]

Faced with the denial of § 117(k), the taxpayer maintained that he made an outright sale of standing timber on certain designated tracts and since such timber was part of the real estate and not held for sale to customers in his trade or business of turpentining, he was entitled to capital gains treatment on the down payment of $40,000 under § 117(j) (§ 1231). The Revenue Service replied that the taxpayer had made only an executory sale of severed timber and had not made an outright sale of standing timber. The court found that the taxpayer had reserved an economic interest in that timber and stated:

> It is well settled that (except where Section 117(k)(2) is applicable) proceeds derived from the severance of natural resources by the holder of an economic interest in the property constitute ordinary income subject to depletion. *Palmer v. Bender*, 287 U.S. 551 (1932).[51]

Hence, the court held that the taxpayer could not claim § 117(k)(2) (§ 631 (b)) since a disposition had not been made of the cutting rights, and he could not claim that he sold a capital asset[52] since he had retained an economic interest in the timber.[53]

In *A. F. Lowes Lumber Co. v. Commissioner*,[54] partners in a timber company were the only shareholders of a corporation in the logging

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[50] 32 T.C. at 1250.

[51] *Id.* at 1254.

[52] It thus was unnecessary to determine as the taxpayer contended that he did not hold the timber primarily for sale to customers, since the court held that the taxpayer had not made a standing sale of timber.

[53] As we have seen, one of the requirements of § 631(b) is that an economic interest be retained upon the disposal. This requirement is discussed more fully *infra*.

[54] P-H Tax Ct. Mem. ¶ 60,141 (1960).

and sawmill business. Certain timberlands were acquired by the partnership with funds advanced by the corporation. The partnership then contracted, in a written agreement, with the corporation to cut the timber and the stumpage payments were credited by the corporation to the account of the partnership, thus offsetting partly the advances made to purchase the timberlands. The corporation deducted on its return the amounts paid to the partnership as part of its cost of sales, and the partners reported the payments from the corporation as income under § 117(k)(2) (§ 631(b)). The corporation had elected to treat the cutting of the timber as sale or exchange under § 117(k)(1) (§ 631(a)). After first contending that the timber was in reality owned by the corporation rather than the partnership and that the form of the transaction should be disregarded, the government contended that the cutting contracts were mere licenses and were not disposals under § 117(k)(2) since they did not expressly state that the corporation agreed to buy or to log the timber.[55] The Tax Court, in holding that the timber cutting contracts were valid and binding bilateral contracts, responded as follows:

> While the timber cutting contracts herein involved did not include specific language to the effect that the corporation agreed to buy the timber, the contracts do state that in consideration of the 'mutual covenants herein contained,' the partnership 'does hereby agree to sell' to the corporation 'all the timber' on the premises. The contract did not specifically mention any promise or covenant on the part of the buyer. However, the evidence and actions of the parties indicate that there was at least an implied promise on the part of the corporation to buy the timber.[56]

Finally, the 1967 case of *Gaskins v. United States*,[57] is an indication that there is still considerable uncertainty among timber owners as to how to achieve capital gains. In the *Gaskins* case, the taxpayer had an oral agreement with another party under which the other party would cut and purchase standing timber owned by the taxpayer. The taxpayer

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[55] This contention was denied by the Tax Court.

[56] P-H Tax Ct. Mem. at 60,821. The Tax Court distinguished *Ah Pah Redwood* and Jantzer v. Commissioner, 284 F.2d 348 (9th Cir. 1960), *aff'g*, 32 T.C. 161 (1959), on the grounds that in those cases, a contract had not been established. After coming to the conclusion that the partnership owned the timber and that there was a valid contract, thus giving the partnership the benefit of § 117(k) (2), the Tax Court held that § 117(k) (1) was available to the corporation.

[57] 20 Am. Fed. Tax R.2d 5144 (M.D. Ga. 1966), *aff'd*, 381 F.2d 729 (5th Cir. 1967). *But cf.* Burroughs and Collins Co. v. United States, 68-1 U.S. Tax Cas. ¶ 9389 (D. S.C.), where the court held that an oral agreement was a valid contract within the meaning of § 631(b).

demanded a jury to determine whether the taxpayer was eligible for the benefits of § 631(b). The district court directed a verdict for the government at the end of the testimony, holding that there was no disposal within the meaning of the section since either party could have terminated the agreement at any time and would have had no obligation to the other. In effect, the court held that there was no more than an option to cut. The case was affirmed per curiam by the United States Court of Appeals for the Fifth Circuit.

It is interesting to note that the taxpayer stipulated with the government to the effect that there was only one issue to be determined by the court,[58] *i.e.*, whether the taxpayer qualified under § 631(b). By so doing, he indirectly admitted that he did not qualify under § 1221. Although an attempt was made to raise § 1221 before the court of appeals, he was held to his stipulation.[59] The court of appeals stated: "The parties agreed in effect, by a pre-trial stipulation, that this jury must find that the oral arrangement included this provision in order for the appellant taxpayer to recover."

In analyzing the foregoing cases, the following summary of the elements necessary to constitute a disposal under a contract might be helpful.[60]

There must be a valid, enforceable contract under state law. It would seem clear that this means that a written agreement should be drawn between the timber owner and the cutter. The cutter must buy and be under an obligation to cut certain timber and must not have a mere option to buy or cut such timber. On the other hand, the owner must sell such timber and dispose of his cutting rights under the contract.

Finally, the date of the disposal may be important § 631(b) provides that the date of disposal shall be deemed to be the date the timber is cut, unless payments are made to the owner before cutting. In the latter case the owner may elect to treat the date of payment as the date of disposal, rather than the date of the cutting. The date of cutting is the date when in the ordinary course of business the timber

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[58] This was in the form of three questions for the jury. The first question relating to disposal was whether (Mr. Barrentine) the cutter had both the right and the obligation to cut an amount of timber agreed upon between the parties. The district court, in answer to this question, stated: "Now therein this case falls. . . ."

[59] Compare the more lenient treatment of the taxpayer in *Ah Pah Redwood*, where the taxpayer was given a new lease on life and on remand persuaded the Tax Court that he had not held the timber primarily for sale to customers and thus would be entitled to capital gains treatment in any event.

[60] These requirements are believed to be necessary to satisfy the Revenue Service. This is not to say that litigation could not result in a favorable outcome if a particular taxpayer finds himself in an after-the-fact situation.

cut is first definitely determined.[61] As we will see, however, all payments including advances must be contingent upon the severance of the timber.

4. *The Taxpayer must retain an economic interest in the timber* — The final requirement of § 631(b) is that the taxpayer by virtue of his contract must retain an economic interest in the timber. The term economic interest is not defined in § 631. The Regulations, however, provide as follows:

> An economic interest is possessed in every case in which the taxpayer acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital.[62]

There were relatively few questions concerning "economic interest" under § 631(b) until long-term timber leases began to surface in the late fifties for Revenue Service evaluation. The crux of the problem was whether a timber owner could turn his lands over to a lessee (normally a major paper company) for a number of years — thus freeing the owner of the burdens of raising and caring for the forest — and receive capital gains on periodic fixed payments.

The response of the Revenue Service was in the form of two major rulings in 1962.[63] In Revenue Ruling 62-81, the Revenue Service was concerned with a contract between an owner of timberland and a paper company regarding all timber growing and to be grown upon a tract for sixty years. The paper company was obliged to pay the owner at a fixed rate per cord for a designated number of cords per year or after the twentieth year, for the estimated annual growth, whichever was greater. After the twentieth year, the company was permitted, although not obligated, to cut an amount not to exceed the estimated annual growth. Timber backlog could be removed in any of the succeeding twelve years, after the year for which payment was made, but the quantity permitted to be cut during the succeeding year had to be cut first. The contract payment was three dollars, subject to periodic adjustments to reflect changes in the Wholesale Commodity Price Index from that prevailing at the execution of the contract. The paper company was

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[61] Treas. Reg. § 1.631-2(b) (2) (1960).

[62] Treas. Reg. § 1.611-1(b) (1) (1960). The regulations thus echo the language of the Supreme Court in Palmer v. Bender, 287 U.S. 551 (1933), where the Court defined economic interest in an oil depletion case.

[63] Rev. Rul. 62-81, 1962-1 CUM. BULL. 153; Rev. Rul. 62-82, 1962-1 CUM. BULL. 155.

required to manage and operate the land in accordance with good forestry practices so that the annual growth would exceed the amount of timber cut and removed or otherwise utilized annually. Furthermore, the company was given beneficial possession of the surface to an extent that would not be detrimental to timber growth. The contract required the company to pay the ad valorem taxes. Title to the timber was to pass to the purchaser as cut.

The Ruling rejected the argument that the periodic rate adjustments and other provisions allowing for pay reductions based on certain contingencies, constituted a sufficient retained economic benefit by the land owner, with the following language:

> The fact that the original unit price is subject to periodic adjustment for changes in the Wholesale Commodity Price Index of all commodities does not give the landowner a retained economic interest in the timber. The provision merely assures the landowner a return which will reflect changes in the general purchasing value of the dollar.
>
> The possibility of a reduction of the purchaser's obligation to pay, to the extent that performance is prevented by specified factors other than fire does not create a retained economic interest in the timber; despite such possibility, the landowner still looks to payments which are not conditioned upon the severance of timber for the recovery of his investment.[64]

The key to the holding was that the agreement did not provide for payments based upon the severance of timber. The Ruling states:

> By the contract the landowner is to be paid stipulated amounts which are not conditioned on the quantities of timber which the paper company cuts. The landowner is assured of a fixed return, and the paper company is committed to a fixed obligation, neither of which is dependent upon, or governed by, the time or degree of severance of the timber. Thus, the landowner does not possess a "retained economic interest" in the timber. Accordingly, the transaction is not a "disposal" of timber under Section 631(b) of the Code.[65]

Revenue Ruling 62-82 involved a long-term lease agreement, whereby the owner received a lump sum payment and the lessee ac-

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[64] 1962-1 CUM. BULL. at 155.

[65] *Id.* The Ruling, however, held that the contract accomplished a sale of the timber existing at the time of its execution. Accordingly, payments made under the contract equal to the fair market value of the timber existing at the execution of the contract constituted proceeds of sale of timber. Such gain would be capital in nature, *provided* the conditions specified in §§ 1221 or 1231 of the Code are met. In other words, the taxpayer must show that he did not hold the timber primarily for sale to customers or that such timber would not have been includable in his inventory.

quired the surface rights, the rights of future operation and the right to cut and remove any and all timber, trees, wood and other forest products standing, growing or being situated and to be situated during the life of the contract. The Ruling reached the same conclusion as Revenue Ruling 62-81.

The Revenue Rulings were upheld in *Dyal v. United States*[66] which upheld the tax rulings. The *Dyal* case involved ninty-nine year leases between the taxpayer and Union Bag Paper Corp. (hereinafter Union). In each lease the taxpayers had granted Union exclusive use and control of the lands as well as the right to use, work and remove the trees, timber and other products. Union, however, was prohibited from cutting any timber during the first seven years of the contracts except for certain purposes. After the first seven years, it was permitted to cut any timber without charge therefor but not in excess of an agreed annual rate of growth. Union agreed to pay fixed amounts annually without regard to the amount of timber cut and removed. The court held that fixed payments made by Union to the taxpayer were ordinary income, and stated:

> It is essential that the consideration for the transaction, whether payable in cash or in kind, be contingent upon the severance of the timber, and payable to the owner solely out of the proceeds from the natural resource itself. . . .
>
> They were not required to look to the sale or severance of the timber for the annual payments, and the obligation of Union Bag to make the annual payments, as well as the amount of each payments itself, was in no way determined or affected by the amount of timber cut, or whether any timber was cut at all. It is plain that as to the fixed annual payments, the taxpayers did not retain an economic interest in the annual growth, and, consequently, do not qualify for capital gain treatment under Sections 631(b) and 1231.[67]

In August of 1968, the District Court for the Southern District of Mississippi was confronted with timber purchase agreements that were similar to the contract in Revenue Ruling 62-81.[68] The taxpayer argued that the ruling was erroneous, and the Fifth Circuit had been wrong in approving the Revenue Rulings. The district court answered as follows:

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[66] 342 F.2d 248 (5th Cir. 1965).

[67] *Id.* at 252. For cases involving "the other side of the coin," that is, whether payments made under such long term arrangements can be claimed as ordinary deductions, see Union Bag-Camp Paper Corp. v. United States, 325 F.2d 730 (Ct. Cl. 1963) and Union Bag-Camp Paper Corp. v. United States, 366 F.2d 1011 (Ct. Cl. 1966).

[68] Crosby v. United States, 292 F. Supp. 314 (S.D. Miss. 1968). The taxpayers in the *Crosby* case acknowledged that the contracts involved before the court and the contracts involved in the Revenue Ruling were essentially the same. While they pointed out two minor differences, they admitted: "Whether there are distinctions with a difference may be a moot point." (Brief for the taxpayers pages 55-56).

> Under the contract before the Court in this case, the revenues derived therefrom by the taxpayer are not in any wise or to any extent contingent upon the severance of the timber, and such funds are not derived solely from the proceeds of the sales of such timber. The amounts paid by St. Regis to the taxpayers are fixed and absolute and without regard to whether or not a single tree is cut or sold. St. Regis acquires the right to cut certain quantities of timber and such cutting of timber may be deferred and may accumulate, but can be cut only on the terms and conditions of the contract. All such timber not cut and removed remains the property of the taxpayer upon the expiration or the termination of the contract. The income derived by these taxpayers under these contracts with St. Regis did not solely result or accrue from the sale of timber. This income resulted from fixed payments required under these contracts to be made by St. Regis without regard to any timber cut from such lands.[69]

Consequently, unless the taxpayer can qualify for capital gains treatment to the extent of the fair market value of the timber at the time he enters into a contract with a major paper company, the long-term lease agreement is not attractive insofar as tax law is concerned. On the other hand, it may well be that the convenience and financial security of a major paper company operating your property will justify the ordinary income treatment.[70]

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[69] *Id.* at 316-17. The court further found that the taxpayers had not qualified for capital gains treatment under § 1221. The court was involved with three different tracts of land. The first tract had been owned for a number of years by L. O. Crosby, Jr.; the Court determined that the timber under this tract was held primarily for sale to customers. Noting a slight difference in circumstances for Tracts No. 2 and No. 3 (since these tracts had been acquired from a closely-held corporation by purchase a few months prior to entering into the agreement with St. Regis), the court stated that "these taxpayers in Cases Number 3449 and Number 3450 are not shown to have acquired this timber for any other purpose than for sale to St. Regis." As an additional ground for the denial of capital gains on these two tracts, the court held that the taxpayers were bound under the doctrine of consistency to prior positions taken before the Revenue Service when an audit was made of the purchase from the corporation. At that time the court found that the taxpayers had maintained that the timber had little or no value, but at the time of trial the taxpayers maintained that the timber had a very high fair market value. It should be recalled that under Revenue Rulings 62-81 and 62-82 — provided the taxpayer could show that § 1221 or § 1231 was applicable — the taxpayer could have received capital gains to the extent of the fair market value at the time the contracts were executed. Since the court held that the timber on the tracts was held primarily for sale to customers, there was no need to determine the fair market value of the timber at the dates of entering the contracts.

[70] For a helpful article in this regard see Sizemore, *Influence of Taxes on Forest Management Policy*, 20 FOREST FARMER 18, 19, 34 (Oct. 1960).

V. Capital Gains Outside of Section 631

Even though a taxpayer has been unable to come under the provisions of § 631, he may qualify for capital gains on timber sales, if there is a sale of standing timber and such timber has not been held primarily for sale to customers or is not includable in the inventory of the taxpayer.[71] Discussion of the various criteria used in determining whether an asset is held primarily for sale is beyond the scope of this article. The standard factors applicable to all sales apply also to timber. The number and frequency of purchases, the purpose of the purchase, number and frequency of sales, the reasons for selling, the extent of the improvement of property while held, period of time the property was held, and the selling activities including advertising are some factors. In addition, the fact that most of the timber is sold to one person or entity does not alter the fact that the primary purpose may be selling timber.[72]

VI. Establishing A Tax Basis and Depletion

It is important to establish the correct basis for timber. This is necessary, of course, to determine loss or gain on timber sales under § 631 or otherwise. In addition, § 611 allows timber cost depletion on timber sales and it is thus necessary to maintain the proper basis for all timber in order to claim depletion at the time of sale.

The regulations pertaining to depletion require the taxpayer to keep accurate ledger accounts, recording the cost, or other basis provided by § 1012, of the property, together with subsequent allowable capital additions in each account.[73] The accounts are to be set up separately, listing the quantity of timber, the quantity of land and the quantity of other resources, if any.[74] In addition, a proper part of the total cost or value is to be allocated to immature timber growth. When the timber becomes merchantable, the amount allocated to small growth is then

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[71] Section 1221, or in some cases § 1231. Primary means of first importance. Malat v. Riddell, 383 U.S. 569 (1966).

[72] Patterson v. Belcher, 302 F.2d 289, *rehearing denied*, 305 F.2d 557 (5th Cir. 1962), *aff'g. in part and rev'g in part* 6, Am. Fed. Tax R.2d 5697 (N.D. Ala. 1960). For other timber cases dealing with the subject, see Consolidated Naval Stores Co. v. Fahs, 227 F.2d 923 (5th Cir. 1955); Broadhead v. Commissioner, P-H Tax Ct. Mem. ¶ 66,026 (1966); Rutland v. Tomlinson, 11 Am. Fed. Tax R.2d 500 (M.D. Fla. 1962), *aff'd per curiam*, 327 F.2d 668 (5th Cir. 1964); Camp Mfg. Co. v. Commissioner, 3 T.C. 467 (1944), *acquiesced in*, 1944 Cum. Bull. 4.

[73] Treas. Reg. § 1.611-3(c) (1) (1960).

[74] Treas. Reg. § 1.611-3(c) (2) (1960).

to be recovered through depletion.[75] The proper allocation among these various accounts in many cases requires the services of a consulting forester.

The taxpayer is required to estimate with respect to each timber account the total units (board feet measure, log scale, cords or other units) of timber reasonably known to have existed on the day of the timber acquisition. Subsequently, as a result of growth, changes in standards of unitization, losses not otherwise accounted for, abandonment of timber or operating or development work, if it is determined at the close of the taxable year that the number of units is more or less than the number in the accounts, then the original estimate shall be revised. The depletion unit is changed when a revision is made.[76]

Specific information listed in the Regulations, including the submitting of Treasury Form "T" (Timber), must be filed with the taxpayer's return in order for him to qualify for timber depletion.[77]

Of course, all additional capital expenditures are to be added to the initial costs and recovered through depletion. The Regulations state that this shall include all amounts paid or incurred in connection with the planting of timber (including planting for Christmas tree purposes). Such amounts include expenditures made for the preparation of the timber site, for planting or for natural seeding and the cost of seedlings.[78]

As a general rule, expenditures for permanent improvements to the property, such as expenditures for equipment, roads, and fire lanes, must be capitalized. On the other hand, if the expenditures are related to the production of income from the timber sales (such as the cost of labor, supplies and materials, temporary roads and fees paid to accountants, foresters and lawyers), they may be deducted as ordinary and necessary expenses. Certain expenditures, however, may be either expensed or capitalized at the taxpayer's option.[79]

VII. Conclusion

The favorable tax treatment of timber operations can be obtained by strict compliance with the statutory provisions. As in other specific sections of the Internal Revenue Code, there are cases where taxpayers have stumbled, through inadvertence or by the failure to follow the requirements of the statute with preciseness, and the benefits though

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[75] Treas. Reg. § 1.611-3(d) (3) and § 1.611-3(c) (2) (1960).

[76] Treas. Reg. § 1.611-3(e) (1960).

[77] Treas. Reg. § 1.611-3(h) (1960).

[78] Treas. Reg. § 1.611-3(a) (1960).

[79] Treas. Reg. § 1.162-12. *See also* Wilbur v. Commissioner, 43 T.C. 322 (1964).

available were not obtained. On the other hand, where taxpayers have tried to acquire benefits never intended—as, for example, in the long-term leases—the courts have as a general rule declined to grant the favorable benefits.

The federal taxation of timber offers special advantages to the timber industry. Even though it would appear that the "timber dealer" was a gratuitous beneficiary to a statute that dealt with inequities facing "timber investors," the benefits to the entire industry now seem solidly secure. The tax impetus should continue to add productivity to the nation's forests.

EXPERT MEDICAL TESTIMONY IN MISSISSIPPI

*Warren H. Adam**

The object of this article is to present the law relating to the introduction of expert medical testimony at the trial court level. It seeks to aid the practitioner who has a case in which expert medical testimony will be required, with emphasis on the possible solutions to problems which may arise during the course of trial.

With this over-all goal in mind, the first order of business must be an attempt to set out the law of expert medical testimony as it presently exists in the State of Mississippi. The analysis and commentary accompanying this exposition is confined, more or less, to the areas of law that are not well defined by the cases or statutes. If the law appears settled then the writer generally refrains from criticism unless the rule involved appears to be unfair or is the subject of general abuse in most other jurisdictions. In this later regard, the physician-patient privilege might appear to warant a more detailed treatment than it has received. However, the physician-patient privilege in Mississippi was given a very thorough analysis by D. C. Welch in Volume 13 of the *Mississippi Law Journal* and the writer felt that there was nothing substantial to be added. Hypothetical questions are a major item of coverage in spite of, or possibly because of, the unsatisfactory manner in which they are so often used.

The presentation of items in the article is much the same as one would encounter in getting expert medical testimony into the record at trial. First, qualification of the witness; next, procedures employed to elicit his opinion; and finally, difficulties which may be encountered in the process of putting the evidence before the judge and jury.

I. Qualification of Medical Experts

Generally, the trial judge has broad discretion in deciding whether or not a witness is qualified as a medical expert.[1] An early Mississippi case, *New Orleans, J. & G.N.R.R. v. Albritton* sets forth the rule (syllabus) that "it is not necessary, that a physician should be a graduate of a medical college, or have a license from any medical board to practice,

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[1] Note, 39 B.U.L. Rev. 207, 209 (1959) (Admissibility is within the discretion of the trial judge. Testimony must be outside the common knowledge of the jury and is admissible if it will aid the jury.); Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414 (1952).

in order to render him competent to testify as an expert, in relation to matters connected with his profession."[2] However, while it is true that *Albritton* has not been expressly overruled, one probably would be hard pressed today to find a Mississippi judge who would allow expert medical testimony by someone other than a licensed physician or surgeon. Courts today seem to assume that a medical expert must be a licensed physician. It is implicit in the language of the opinions. It appears that in 1859, when *Albritton* was handed down, a license granted by the state was not a prerequisite to the practice of medicine. Such is not the case today. Therefore, it is reasonable to conclude that as the expertise required to practice medicine has increased, there has been a concomitant increase in the expertise required of witnesses testifying as medical experts. It would be anomalous, indeed, to allow medical testimony to be given by a person who legally could not practice medicine in the first place.

Mississippi draws a distinction between the qualifications required of a doctor who has treated the patient (a treating physician) and one who has acted as a consultant for the purpose of testifying in a particular case as a medical expert. The treating physician, provided he is an M.D.[3] can give his opinion regarding his patient's disease, condition or difficulty. He need not be a specialist in the field of medicine involved. The major criterion is that his opinion be based on *first-hand knowledge.*[4] Specialization or not goes to the weight of the evidence and not to its admissibility. While a General Practitioner *with first-hand knowledge* may give testimony on a seemingly unlimited variety of ailments, it appears that a General Practitioner *without first-hand knowledge* is incompetent to give an opinion which falls within a well defined specialty such as psychiatry. The field of mental disease appears to be one area where a physician without first-hand knowledge may not testify unless he is a specialist or, at least, has had some specialized training or experience. This rule is rather surprising in light of the fact that even a layman may express an opinion as to the sanity of an individual, provided that he bases his opinion on first-hand knowledge. There appears to be no middle ground—the General Practitioner is put on the same level as the layman so far as admissibility is concerned. However, as a practical matter, the jury probably would accord the testimony of the General Practitioner more weight than that of the layman.

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[2] 38 Miss. 242 (1859).

[3] Courts generally let an M.D. testify in any area of medicine. They are "quite willing to recognize any holder of an M.D. degree as a universal expert on science." Smith, *Scientific Proof and Relations of Law and Medicine*, 23 B.U.L. REV. 143, 147 (1943).

[4] *But see* Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952), which indicates that the trend in other jurisdictions may be toward requiring specialization.

In *Russell v. State*[5] it was held that an ordinary General Practitioner with no expertise in the field of mental disease was incompetent to give an opinion as to the defendant's sanity in response to a hypothetical question posed at the trial. However, the court indicated that if this General Practitioner had had personal knowledge of the defendant's condition, then his opinion would have been admissible. The court in *Reed v. State*,[6] a much cited case, went so far as to say: "A non-expert witness who has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, may depose, not only to particular facts, but to his opinion or belief, formed from such actual observation as to the sanity or insanity of such person."[7] While this case seems to go quite far in allowing opinion testimony by non-expert witnesses, it should be noted that the opinion deals solely with the question of sanity. Even though the case has not been overruled and presumably is still good law,[8] it is doubtful that too much reliance should be placed on it. Over the years there has been a tremendous change in the field of medicine concerned with mental disease. While it may have been true in 1894, that one person's guess as to sanity was as good as another's, medical men today feel there is a reasonable degree of certainty in the diagnosis of mental diseases. They would certainly disagree with the notion that the typical layman can give a reasonable opinion as to sanity or insanity. If a lawyer can get a psychiatrist or psychologist to give an opinion as to mental condition, it would seem imprudent for him to rely on the honest but uninformed opinion of a layman.

II. Bases For Expert Testimony

Generally, a physician may base his expert opinion on (1.) personal knowledge,[9] (2.) hypothetical questions,[10] (3.) testimony of previous witnesses,[11] and (4.) history given him by his patient or a third

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[5] 53 Miss. 367 (1876).

[6] 62 Miss. 405, 408 (1884).

[7] *Id.* at 408. The Mississippi rule appears to be that even lay witnesses may give their opinions if they have had sufficient opportunity of observation and if they first state the facts upon which their opinions are based. Wood v. State, 58 Miss. 741 (1881), *But see* Blalock v. Magee, 205 Miss. 209, 38 So.2d 708 (1949) where a lay witness was allowed to first state his opinion and *then* give the facts upon which his opinion was based. *See generally* 40 A.L.R.2d 15 (1955).

[8] Professor Wigmore notes that the state of the law in Mississippi is that "[L]ay opinions (on sanity) are admissable . . . (but the data observed must first be stated)." 7 Wigmore, Evidence, § 1938, at 42 (3d ed. 1940).

[9] Wild v. Bass, 252 Miss. 615, 173 So.2d 647 (1965).

[10] Birchett v. Hundermark, 145 Miss. 683, 110 So. 237 (1926).

[11] Prewitt v. State, 106 Miss. 82, 63 So. 330 (1913).

party.[12] The listing of these bases starts with the strongest, personal knowledge, and ends with the weakest, history given to the physician.[13]

When the doctor bases his testimony on personal knowledge the in-court procedure is relatively simple. The lawyer lays a foundation by having the witness recite all the facts upon which he relied in making a diagnosis. The lawyer then asks the witness if he has formed an opinion based on these facts and, if the answer is yes, then what that opinion is.

If the physician bases his opinion in whole or in part on facts not within his own personal knowledge, then the process becomes much more difficult—it can, in fact, become terribly complicated. Probably the most serious complicating factor is the hypothetical question.[14] The use of hypothetical questions may be helpful when an expert must base his opinion on assumed facts of which he has no first-hand knowledge. However, they can become extremely confusing if inartistically used. Distaste for long hypothetical questions is not a new phenomenon or the result of the modern lawyer's recent recognition of an old problem. In 1876, the court in *Russell v. State* had this to say concerning hypotheticals: "Such testimony at best is of an exceedingly unsatisfactory character, and is often as much calculated to mislead as to guide to a correct conclusion."[15] As the court said, it probably is true that hypothetical questions are, at best, troublesome; at worst, they are a nightmare of verbiage that leads to inefficiency on the part of court and counsel and hopeless confusion on the part of the jury.

The Mississippi Supreme Court has tried to eliminate some of the evils of the hypothetical by vesting trial judges with wide discretion in deciding on the appropriateness of the questions propounded in the course of trial. The trial judge's decision in this regard will not be overruled unless his discretion "very clearly appears to be wrongfully exercised."[16] However, even given this strict judicial scrutiny, there appears to be no way to prevent hypotheticals that would exhaust even the most

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[12] Wild v. Bass, 252 Miss. 615, 173 So.2d 647 (1965); McPhail v. State, 56 So.2d 72 (Miss. 1952).

[13] For an exhaustive treatment of the bases of expert medical testimony see Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1962).

[14] Spoken of by one commentator as "the pernicious hypothetical question . . ." Smith, *Scientific Proof and Relations of Law and Medicine*, 23 B.U.L. REV. 143, 147 (1943).

[15] 53 Miss. at 380.

[16] Providence Washington Ins. Co. v. Weaver, 242 Miss. 141, 153, 133 So.2d 635, 640 (1961).

vigorous attorneys and lull to sleep even the most conscientious jurors.[17] It appears that Mississippi, along with some of her sister states, may be moving towards a procedure that in some cases could obviate the need for long hypotheticals. In *Providence Washington Ins. Co. v. Weaver*[18] the court first stated that the usual method of eliciting an opinion from medical experts lacking first-hand knowledge is the hypothetical, but then it went on to say: "Where there is no conflict in the evidence . . . it may be convenient to allow the witness to be asked his opinion generally upon the testimony without embodying it in a hypothetical question."[19]

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[17] E.g., the prosecutor in Cates v. State, 171 Miss. 106, 157 So. 95 (1934), put the following hypothetical to a witness: "Now with particular reference to the proposition of insanity that we are dealing with here, now I want to make inquiry of you, keeping in mind that all I am interested in is the ability to distinguish between right and wrong. Now, with that idea that if a person is able to distinguish between right and wrong, that he is sane, I want to ask you this question: As you understand this is a case where Mr. Prince Cates, the defendant, is charged with the murder of Bob Cooper on the seventh day of August this year, and the defense is insanity. Now I want to ask you this: If the man, Bob Cooper, shot some cows on Sunday and some of the shot fell in Cates' house and struck his little girl, and when he came in that evening, or that night, his wife told him about it, and it made him mad, and the more he thought about it, the madder he got, until he didn't sleep any scarcely that night, and the next morning he saw Cooper feeding his hogs on an adjoining lot, and he got up and got his gun and had it across his lap, and was sitting on the front gallery of his home when Miss Hobby passed along there, and he spoke to her and said, 'Good Morning, Miss Hobby,' and he saw Bob Cooper and Sam Burnside standing down there some distance talking near the scene where this killing occurred, and that he went from his house down to where the conversation was taking place, and took his gun on his shoulder, and that when he got within a few feet of Cooper he said, 'Bob,' and Cooper turned around, and Cates said, 'You shot my little girl yesterday,' and Cooper said, 'Where was she' or words to that effect, and Cates said, 'Damn you, I will shoot you,' and shot him, and that Cooper said, 'Don't shoot,' and Burnside said, 'Don't shoot the man,' and that Cooper threw up his hand at the time he shot, or after he shot, and Cooper said, 'Oh, Lord'; that Cates looked at Cooper and looked at Burnside, and then went on down the trail towards the post office, where he met Mr. A. J. Gordan and said, 'Mr. Gordan,' and Gordan said, 'What,' and Cates said, 'I have just shot Bob up there, call the sheriff and tell him to come and get me.' That the sheriff did come from Philadelphia, and he was driving up he saw Cates and another man, and stopped his car and called him, or Cates inquired if that was the sheriff, and the sheriff told him it was, and he said, 'Well, I reckon I am the man you are looking for,' and got in the sheriff's car, and he drove up towards the place where Cooper was lying dead, and Cates told him that he didn't want to go up there where Bob was. Now, if those facts and circumstances are true, in your opinion, was the man, Cates, sane or insane at the time he killed Bob Cooper?" 171 Miss. at 118-19, 157 So. at 98. The trial judge was later reversed because certain undisputed material facts had been omitted from the question.

[18] 242 Miss. 141, 133 So.2d 635 (1961).

[19] 242 Miss. at 152-53, 133 So.2d at 640.

In *Prewitt v. State*,[20] the court held that where there is no conflict in evidence the trial judge in his discretion may allow the witness to give his opinion without the use of a hypothetical question.

Another possible method which has been used by other jurisdictions, would be to allow the witness to first state his opinion and then give the facts upon which he bases his opinion.[21] This, in effect, would break into manageable parts the long hypothetical. It would have the further effect of apprising the jury at the outset of the object sought to be proved. The jury would have the opinion before it and could then weigh each factor as it is brought out in testimony instead of having to remember a large number of details and evaluate them retrospectively in the light of the opinion which they purportedly support. The cat would immediately be out of the bag and no one would waste time playing a guessing game. There appears to be no direct support in Mississippi case law for this last procedure,[22] but, given a court with the progressive spirit of the court in *Weaver*, such a procedure might be allowed.

In a case where a conventional hypothetical must be used there must be assumed therein "a state of facts, which has been shown by the evidence of other witnesses or by the testimony of the expert himself."[23] If there is conflicting testimony, then the propounder, within limits, can state the question so as to favor his own theory of the case.[24] If there is "same support"[25] for his position, then the question will be upheld. "Each of the facts embraced in the hypothetical question . . . must have some support in evidence . . . to justify its being propounded to the witnesses."[26] On the other hand, it is error to omit material, undisputed facts favoring the opposite side.[27] In *Cates v. State*[28] a murder conviction was reversed where the district attorney had omitted undisputed facts which the court considered relevant to the issue of insanity of the defendant.

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[20] 106 Miss. 82, 63 So. 330 (1913).

[21] *See, e.g.*, Commonwealth v. Johnston, 188 Mass. 382, 74 N.E. 939 (1905); People v. Youngs, 151 N.Y. 210, 45 N.E. 460 (1896). For a general discussion of the issue see 82 A.L.R. 1338 (1933).

[22] *But cf.* Blalock v. Magee, 205 Miss. 209, 38 So.2d 708 (1949), where a *lay* witness was allowed to first state his opinion as to *sanity* and then give the facts upon which his opinion was based.

[23] Williams Bros. Co. v. McIntosh, 226 Miss. 553, 560, 84 So.2d 692, 695 (1956).

[24] Cates v. State, 171 Miss. 106, 157 So. 95 (1934).

[25] Birchett v. Hundermark, 145 Miss 683, 693, 110 So. 237, 238 (1926).

[26] *Id.*

[27] Cates v. State, 171 Miss. 106, 157 So. 95 (1934).

[28] *Id.*

The jury must know the source of the facts on which the expert bases his opinion.[29] Was it based on facts within his own personal knowledge or was it based on facts brought out by other witnesses?[30]

The Mississippi Supreme Court condems the practice of "piling inference on inference."[31] The court does not explain what is bad about a pile of inferences. However, it appears that it is voicing the general rule that the opinion of one expert cannot be based on the opinion of another expert. This rule has some basis in reason—it seems appropriate to require an expert to base his opinion on the best information available to him. Instead of hearing the opinion of someone else, he should hear the facts upon which that opinion is based and then make his own evaluation. However, there might be some instances wherein a person with a good general knowledge of a certain field of medicine could evaluate the opinions of specialists in several sub-categories of the same field and come up with an opinion that he could not have reached had he been required to rely solely upon raw data supplied by each specialist. Accordingly, if none of the specialists mentioned above would be qualified to give an overall evaluation in the case it seems that it might be advisable to allow an opinion based on other opinions. Also, here, as in the area of testimony by a lay witness, it may be difficult to separate fact from opinion. It is hard sometimes to draw the line where fact ends and opinion begins. *E.g.*, Q. Was the man drunk? Q. Was he anxious? Q. Was he relaxed? Happy? In these few examples it would seem far better to allow an opinion to slip into evidence than to try to get a witness to give an objective description of something as difficult to describe as the outward physical manifestations of a person's state of mind. The same might be true of a doctor who is required to relate the symptoms he observed in a patient instead of being allowed to simply state that the patient had a head cold.

Some courts voice concern that an expert witness may "invade the providence of the jury" by giving his opinion on an "ultimate fact in

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[29] Prewitt v. State, 106 Miss. 82, 63 So. 330 (1913).

[30] Mutual Life Ins. Co. v. Rather, 221 Miss. 527, 73 So.2d 163 (1954). "[A] medical expert may base an opinion 'partly on facts within his own personal knowledge and partly on facts shown by the testimony of others . . .' 32 C.J.S. Evidence, Section 536, pp. 255-6."

[31] "[W]e are of the opinion that the question did not assume or inject any inferences into the case to the extent that the verdict resulted from the piling of inference on inference nor that it assumd [sic] or embraced any facts that had not been shown in evidence." Southern Farm Bureau Cas. Ins. Co. v. Jones, 236 Miss. 604, 610, 111 So.2d 659, 661 (1959).

issue."[32] This concern seems ill-founded. The jury is by no means bound by the testimony of any witness—expert or otherwise.[33] There is no reason to believe that the jury is subject to overreliance on the testimony of a medical expert relative to the "ultimate fact in issue" any more than it would overrely on any other fact upon which an opinion is given. The general trend in the United States has been away from inadmissibility as an invasion of the jury's province,[34] and one might hope that Mississippi courts will follow this trend and reject this unrealistic and largely unworkable rule.

III. Some Hearsay Problems

Learned Treatises. Learned treatises as substantive evidence are generally inadmissible. The reasons for this rule are adequately stated by the court in the case of *Tucker v. Donald:*[35] Extracts from such a book could be no more than a written statement of the opinion of the author, expressed perhaps many years before, liable to subsequent change or modification, not delivered under oath or in the presence of the court, with no opportunity for cross-examination by the other side, nor of explanation and application to the particular facts of the case in hand by the author. "However high, therefore, may be the general character of the work it lacks every safeguard which distinguishes hearsay from legal evidence, and stands, therefore, upon a far inferior and wholly different footing from the testimony of the humblest expert."[36]

With regard to the use of a learned treatise as a basis for the opinion of an expert, the court in *Tucker* was less conclusive. In fact, it prefaced its ruling of inadmissibility of the treatise with the explanation that it did not view the offer as merely corroborative or explanatory.

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[32] *E.g.*, Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 148 So.2d 693 (1963), where it was held that for an "accidentologist" to state his opinion as to the cause of an accident where there were no eyewitnesses was to usurp the function of the jury. *See generally,* 66 A.L.R.2d 1082 (1959) and Note, 39 B.U.L. Rev. 207 (1959).

[33] ***But cf.*** Favre v. Louisville & N.R.R., 180 Miss. 843, 178 So. 327 (1938), where Judge Griffith indicated, without expanding on the matter, that a photograph might constitute evidence that would be conclusive on the issue of whether there was sufficient clearance between a cattleguard and a freight car upon which a brakeman, of whose estate plaintiff was administrator, was riding. "This photograph is so manifestly a clear and almost perfect reproduction, down to the slightest material detail, and is so obviously taken from the proper camera position . . . that it amounts to a conclusive demonstration of the physical facts disclosed by it." 180 Miss. at 861, 178 So. at 330.

[34] Note, 39 B.U.L. Rev. 207, 213 (1959).

[35] 60 Miss. 460 (1881).

[36] *Id.* at 470.

This might tend to indicate that, in the discretion of the trial judge, such a treatise would be admitted for the limited purpose of forming a basis for the expert's opinion. Courts in other jurisdictions have so held.[37]

Turning to the question of admissibility of learned treatises for impeachment purposes, there are two recent student comments in the *Mississippi Law Journal*[38] dealing with this subject. *City of Laurel v. Upton*[39] is cited by both authors in support of the proposition that Mississippi, in fact, does allow the use of learned treatises to impeach the prior testimony of a medical expert. The reasoning behind this assertion is interesting and bears investigation. In *Upton* the court held that certain reports relied upon by a physician in forming his opinion should have been admitted in evidence, irrespective of the privileged communications statute, in order that the witness could be cross-examined relative to the content of the reports. The author of one article equates these reports with short, learned treatises and concludes, therefore, that the court has established the admissibility of learned treatises for impeachment. The author of the second simply cities *Upton* in support of the conclusion that the treatises are admissable for the impeachment or testing of the witness.

It would seem that one should exercise caution in equating with learned treatises a report made (a) by a single doctor, (b) relative to the condition and treatment of one patient, (c) under circumstances which would not require a searching analysis of some particular disease. It is doubtful that such a report would be granted the status of a learned treatise by the members of the medical profession. In its inception and execution it was not so intended. It was intended to be used solely in the treatment of one patient. It was not conceived as an expository writing to be used as an aid by other physicians with less expertise on the subject in question. It was not analyzed or evaluated by other members of the medical profession who could give their opinions as to its correctness. The contrast between such a report and a medical treatise is indeed sharp. Perhaps *Upton* is better read as indicating that the court will require the expert to disclose whatever information he may have relied upon in forming his opinion in order that the opposing side may ade-

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[37] *See* Finnigan v. Fall River Gas Works Co., 159 Mass. 312, 34 N.E. 523 (1893), where Justice Holmes stated: "Although it might not be admissible merely to repeat what a witness had read in a book not itself admissible, still, when one who is competent on the general subject accepts from his reading as probably true a matter of detail which he has not verified, the fact gains an authority which it would not have had from the printed page alone, and, subject perhaps to the exercise of some discretion, may be admitted."

[38] 38 Miss. L.J. 296 (1967); 37 Miss. L.J. 327 (1966).

[39] 253 Miss. 380, 175 So.2d 621 (1965).

quately cross-examine him relative to the basis of his opinion. The effect of this ruling would seem to be that an expert who has based his opinion partly on a learned treatise would have to disclose that fact and the opposing side could then use that treatise in cross-examination. Under such a reading, the scope of the ruling in *Upton* is broad indeed. It would give the cross-examiner the right to use any material part of the basis for the expert's opinion. It would seem to follow that if the expert refused, or was unable, to disclose the basis for his opinion then the court would have his opinion stricken. Such a rule would seem to be in keeping with the generally accepted feeling that all testimony should be subject to thorough cross-examination.

Whether the court will apply *Upton* so as to allow the use of learned treatises for impeachment even if the expert has not relied on it in forming his opinion is a different question. It is one thing to require disclosure of bases and to allow cross-examination on those bases; it is quite another proposition to allow admission of a learned treatise on its own bottom for the purpose of impeachment. Whether the court will construe *Upton* as allowing the latter procedure remains to be seen.

Medical History. It might be useful first to explore the different types of medical history that might be encountered in the context of expert medical testimony: (1) History given by the patient to the treating physician, (2) history given by the patient to an examining physician for the purpose of litigation, and (3) history given by a third party either to a treating or examining physician. At the outset it would seem safe to assert that all history is hearsay. Therefore, in order to admit it there must be some reason to suspect that it is reliable and not open to the objections generally made against other hearsay. This added reliability must stem from the feeling that a person who wants medical treatment will tell his doctor the truth. However, this concept does have certain limitations. Everything that a doctor hears from or about a patient is not necessarily reliable. Many times there is no reason to impute a special trustworthiness to the hearsay. If a patient goes to a doctor with the knowledge that litigation is likely, one might suspect that the history he gives will lack the inherent veracity necessary to take it out of the area of the hearsay exclusion.[40] Therefore, it seems that the reason for imputing special trustworthiness must be confined to the cases where the physician testifying is a treating physician. Even assuming a treating physician, care must be exercised to ensure that the patient did not add a certain gloss to his history with an eye to the possibility of future litigation.

So far the assumption has been that the injured party himself has given the history. Suppose a relative or an interested bystander gives it.

[40] McPhail v. State, 56 So.2d 72 (Miss. 1952).

With regard to a relative of the injured party, a recent decision by the Mississippi Supreme Court[41] indicates that a trial judge might admit such history when given by an injured child's mother:

> There might be cases where the court in its discretion would be justified in allowing a medical expert to use as a part of the basis for his findings the previous history given to him by the child's mother. This would be confined to cases where the child is carried to the doctor for the purpose of treatment. However, if the purpose of the examination by the doctor is to provide testimony, the court should not allow the doctor to base his opinions and finding on such a history if the same is not in evidence in the case.[42]

This seems to be a sensible and realistic rule. The trial judge is given discretion and, in the light of the circumstances of a given case, should be able to determine the reliability of the proposed testimony. However, the supreme court does leave several questions unanswered. It specifically mentions a child's mother. What about other close relatives of the child, or the wife or husband of an injured party? Might it be wise to vest discretion in the trial judge to handle these situations also?

X-Rays. The leading case dealing with the admissibility of x-rays in Mississippi is *Beard v. Turritin.*[43] This case, in conjunction with two others, *Gulf Research Dev. Co. v. Linder*[44] and *Howell v. George,*[45] rather clearly sets out the elements essential to the introduction of x-ray evidence. However, before getting into a detailed discussion of this trilogy of cases, a few words on the general nature of x-ray evidence may be appropriate.

All courts seem to be in agreement that x-ray evidence must be verified or authenticated before being admitted into evidence.[46] This au-

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[41] Wild v. Bass, 252 Miss. 615, 173 So.2d 647 (1965).

[42] 252 Miss. at 627, 173 So.2d at 651.

[43] 173 Miss. 206, 161 So. 688 (1935).

[44] 177 Miss. 123, 170 So. 646 (1936).

[45] 201 Miss. 783, 30 So.2d 603 (1947).

[46] *See* 5 A.L.R.3d 303 (1966). "All the cases agree, either explicitly or by necessary implication, that before X-rays may be admitted in evidence in civil cases they must be verified and authenticated in essentially the same manner as photographs and other pictorial evidence, that is, the accuracy and correctness of the X-rays must be proved, which proof usually includes identification of the pictures." *Id.* at 307. When making the analogy between photographs and X-rays it should be kept in mind that the photographer can compare his photographs with what he remembers the subject to have been at the time he took the picture. He can then testify that the photograph is a true and accurate representation of the subject as it was at the time the picture was taken. On the other hand the X-ray technician cannot compare the sciagraph with an image retained in his memory. He is taking a "picture" of something invisible to the naked eye. The product of his work must be authenticated by some other means.

thentication may be accomplished in several ways. Courts usually hold that the following proofs are relevant: "(1) Identification of the subject matter . . .; (2) [a]bsence of change in the subject matter . . .; (3) [r]eliability of apparatus . . .; (4) [q]ualification of the operator . . .; [and] (5) [d]escription of operation. . . ."[47] These factors are obviously not independent. They are interrelated and the proof of one may, in some fact situations, constitute proof of another. Also, it should be added that proper authentication usually will not require proof of all five; one or two usually will suffice.[48]

Now we may turn to the Mississippi cases. In *Beard*, decided in 1935, the plantiff had been injured in an automobile collision. Shortly after the collision the plaintiff's attending physician took her to a hospital and made an x-ray of her back and spine. Plaintiff's attorney, in offering this x-ray, made a careful and thorough authentication. To identify the sciagraph, he called the technician in charge of the radiology department of the hospital where the x-ray was made, who testified that she had taken the x-ray and immediately had noted on the exposed film the patient's name, the date, the area of the body x-rayed, the hospital and serial number, the side of the patient x-rayed, and the city in which the hospital was located. From this data the technician was able to identify the sciagraph positively as the one she had taken of the plaintiff. The court accepted this identification with approval even though the technician admitted that because of the lapse of time, she would not presently recognize the plaintiff as the patient whom she had x-rayed. Noting with approval that the sciagraph had been made under the attending physician's direction, the court then affirmed a verdict and judgment for the plaintiff.

In the *Linder* case the opposite result was reached. There, the plaintiff's attorney did not call the x-ray technician, but instead, attempted to authenticate the sciagraph through the tesimony of a chiropracter who sought to interpret it to the jury. As the basis of his auhentication, the chiropracter stated that he had asked a doctor to get the x-ray made for him and that the doctor had done so. In holding that this authentication was insufficient, the court noted: "X-ray pictures, like photographs, maps and diagrams, when material, are admitted in evidence on authentication which satisfies the court that the thing or person is fairly portrayed by the X-ray."[49]

Considering *Beard* and *Linder* together, it might appear that the only safe way to authenticate an x-ray would be to call the technician who made it. Such a rule could be very troublesome for plaintiffs. In

[47] *Id.* at 314.
[48] *Id.*
[49] 177 Miss. at 132, 170 So. at 648.

addition to the added expense of calling another expert witness, there would be the possibility that the technician would be unavailable for testimony. The plaintiff would have a much easier time of it if the doctor who was already at the trial for the purpose of giving expert medical testimony could also authenticate any x-rays which he had made. The *Howell* case, decided in 1947, made such an authentication possible. There, unlike *Linder*, the same doctor who had ordered the x-ray was called to authenticate it. He testified that it was taken in his presence by the regularly employed operator in a modern hospital and that he, himself, in fact was capable of taking the picture. The court in speaking of what it had held in *Linder* stated:

> We also held . . . that there must be evidence, or its equivalent that the picture was made by a competent person with a proper machine, and that the question is a preliminary one to be addressed to the sound discretion of the court. In that case [*Linder*], it is to be noted that it was not shown where the picture was made, or whether the person making it was skilled therein, or whether made on a proper machine, nor was anything shown in the evidence equivalent thereto.[50]

Judge Smith then went on to say that the trial court could take judicial notice that all modern hospitals make x-rays, carefully preserve them, employ skilled operators, and use proper machines.[51]

Evaluating these three cases, it appears that a treating physician now may authenticate an x-ray provided he can identify it as the one he ordered taken by the staff of a modern hospital. The trial court can then be expected to take judicial notice that all modern hospitals (a) make x-rays, (b) carefully preserve them, (c) employ skilled operators, and (d) use proper machines. Of course, under *Beard* the attorney, if he so desires, may call the technician and have him identify and authenticate the x-ray.

When dealing with x-rays, the litigant may run afoul of the privileged communications statute mentioned earlier. It appears than an x-ray will be deemed to fall within the statute if testimony by the doctor who ordered it would be subject to the privilege.[52]

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[50] 201 Miss. at 789-90; 30 So.2d at 604 (1947).

[51] *Id.*

[52] "We think the court correctly ruled that Dr. Gamble (R.R. physician) was incompetent, and in also ruling that the X-ray picture was incompetent, because made for the use of physicians, and was a part of the information acquired by the physicians in attending the patient." Tonkel v. Yazoo & M. V. R. R., 170 Miss. 321, 329, 154 So. 351, 353 (1934).

IV. The Physician-Patient Privilege

> All communications made to a physician or surgeon by a patient under his charge or by one seeking professional advice, are hereby declared to be privileged, and such physicians or surgeons shall not be required to disclose the same in any legal proceeding, except at the instance of the patient, by his personal representative or legal heirs in case there be no personal representative.[53]

This statement of the right of a patient to suppress testimony by his physician has been enacted by the Mississippi legislature. Some commentators have found fault with such a privilege in certain cases.[54] It may be useful to explore the application of the privilege in the medico-legal context, where a patient brings a damage action for injuries sufered at the hands of the alledgedly negligent defendant. Typically, he will call a medical expert who will testify to the existance and extent of the injuries for which the paintiff is seeking compensation. Clearly, the patient has waived the privilege with regard to this particular doctor's investigation of his injury.[55] However, suppose the patient had gone to another doctor before going to the one now testifying. Suppose this previous doctor had examined him, and on the basis of his examination, would be prepared to give testimony harmful to the plaintiff's case. Is there justification in reason or policy for allowing the patient to keep this damaging evidence from the jury?

The privilege is sometimes predicated on the notion that allowing a doctor to talk about a patient would tend to violate a patient's right to privacy. The information that a physician might disclose could concern details of the individual's life which should not be exposed to the public view. In many cases this certainly would be true. But what about our hypothetical case where the patient, himself, has laid bare the details of his own injury through the testimony of another doctor? There would not seem to be any reason now to suppress the testimony of another doctor relative to the same injury.

An interesting situation arose in *Upton*, discussed earlier in connection with learned treatises. There the plaintiff's doctor had based his opinion partly on reports furnished him by another doctor who had treated plaintiff. The Mississippi Supreme Court held that these reports, because they formed part of the basis of the doctor's testimony, would have to be introduced into evidence, notwithstanding the privileged

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[53] Miss. Code Ann., § 1697 (1956).

[54] Welch, *Another Anomaly—The Patients Privilege,* 13 Miss. L.J. 137 (1941).

[55] Also, "[i]f the plaintiff voluntarily testifies as to fragments of communications between himself and his physician, the privilege is then surrendered. . . ."*Id.* at 157.

communications statute. As a result, the defendants were put into the position of being able to demand the introduction of reports made by a doctor whom they could not call in person if plaintiff claimed his privilege.

Another basis asserted for the privilege is that it is necessary to preserve the special relationship deemed to exist between a doctor and a patient whom he is advising or treating. The patient must be assured that what the doctor learns about him will be kept confidential. This assurance is desired in order that the patient will be free to divulge potentially embarrassing information. This is one of the same arguments made in favor of the attorney-client privilege. It is open to the same criticism. Many people would argue that this incentive to free communication is not necessary. If a person thinks he needs medical treatment he will confide in his doctor with or without the assurance of confidentiality. Many critics go further and assert that most patients do not even know the privilege exists when they go to a physician for treatment —the only ones who do learn of it are the prospective plaintiffs who have litigation in mind at the outset.[56]

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[56] "It is a truism, that, as a matter of fact, the patient's disclosure is not induced by the statutory privilege protecting such communications." *Id* at 139-40.

STUDENT COMMENTS

TITLE II OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 AS IT AFFECTS THE ADMISSIBILITY OF CONFESSIONS AND EYEWITNESS TESTIMONY

Then call them to our
presence; face to face,
and frowning brow to brow,
ourselves will hear
The accuser and the accused freely speak.
Richard II (I:16)

Judging from the above quotation, apparently confrontations between an accused and his accuser represented a troublesome area even in the time of Shakespeare. In this respect, times have changed very little. The problem of custodial interrogations and confessions particularly has been an area of abuse and controversy, largely because the proceedings take place in guarded secrecy.[1] Nevertheless, the courts—notably the United States Supreme Court—have addressed themselves to the problems flowing from custodial interrogation and frequently have condemned police procedures employed in this area, from the physical torture present in *Brown v. Mississippi*[2] to the more subtle, psychological pressures applied in *Spano v. New York*.[3] The courts have pursued a commensurable course of inquiry into the problems recurrent in the area of eyewitness identifications; perhaps in no other area of criminal law have the decisions of the Supreme Court created more controversy.[4]

The courts have been the chief propounders of the new code of police conduct, but more recently, Congress entered the field of conflict by enacting Title II of the Omnibus Crime Control and Safe Streets Act of 1968.[5] For the most part Title II deals with the admissibility of confession evidence, although a small portion of it is directed toward the admissibility of eyewitness testimony. The pertinent provision of Title II with respect to the admissibility of confessions is as follows:

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[1] *See* Miranda v. Arizona, 384 U.S. 436, 445 (1966).
[2] 297 U.S. 278 (1936).
[3] 360 U.S. 315 (1959).
[4] CRIM. L. REP. 1079 (August 21, 1968).
[5] Pub. L. No. 90-351 (June 19, 1968).

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.[6]

This provision was enacted to nullify the Supreme Court decisions of *Miranda v. Arizona*[7] and *Mallory v. United States*[8] and to restore the voluntariness ("totality of the circumstances") test.[9] Whether this objective was achieved is questionable.

Title II also includes the following provision with respect to eyewitness identification:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible into evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.[10]

This section was included in Title II to counter earlier decisions of the United States Supreme Court, notably *United States v. Wade*[11] and *Gilbert v. California*,[12] which held that a pre-trial lineup was a "critical" stage of a criminal prosecution and that an accused was entitled to the presence of counsel at such lineup. Whether this provision will have the intended effect is also questionable.

If valid, however, both of these provisions represent abrupt, though limited, departures from existing law in their respective areas of criminal law and procedure. At any rate, their effect upon existing law properly begins with an examination of the extent of the decisions mentioned.

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[6] *Id.* § 701(a).

[7] 384 U.S. 436 (1966).

[8] 354 U.S. 449 (1957).

[9] *See* 3 CRIM. L. REP. 1042 (June 12, 1968) and 36 U.S.L.W. 1197 (June 25, 1968).

[10] Pub. L. No. 90-351, § 701(a) (June 19, 1968).

[11] 388 U.S. 218 (1967).

[12] 388 U.S. 263 (1967).

I. Miranda And Its Effect Upon Custodial Interrogation

A. Voluntariness Test

The impact of *Miranda* and the effect of Title II of the Omnibus Crime Control Act on the *Miranda* standards can be measured more accurately against the background of law that existed prior to *Miranda*. The test of admissibility of confessions prior to *Miranda* was the voluntariness test—i.e., a determination of whether the confession was given voluntarily.[13] Perhaps the first full-bodied expression of the voluntariness test occurred in *Brown v. Mississippi*.[14] In *Brown* all three petitioners were arrested in connection with a murder and were beaten and tortured until they confessed to commission of the murder. The details of the whippings were brought out at trial upon examination of the petitioners and examination of the participants, who admitted the whippings. The confessions constituted the only evidence against the petitioners.[15] Apprised of these circumstances, the Court noted that

> the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process. . . .[16]

The two dissenters on the Mississippi Supreme Court, to their everlasting credit, had reached this same conclusion:

> There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment . . . .[17]

The Court in *Brown* noted that the methods used to extract the confessions were "revolting to the sense of justice,"[18] and clearly the use of physical torture to induce confessions is a procedure worthy of condemnation. But as police procedures became more refined, the Court

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[13] In federal prosecutions this test can be traced back at least as far as Bram v. United States, 168 U.S. 532 (1897).

[14] 297 U.S. 278 (1936).

[15] *Id.* at 279-85.

[16] *Id.* at 287.

[17] 173 Miss. 542, 574-75, 161 So. 465, 471 (1935), Griffith, J. (dissenting). The United States Supreme Court quoted this language with approval in its opinion. 297 U.S. at 283.

[18] 297 U.S. at 286.

continued to apply the voluntariness test, in state as well as federal prosecutions,[19] reaching not only those confessions procured through threats or violence, but those obtained by use of " 'any direct or implied promises, however slight, [or] by the exertion of any improper influence. . . .' "[20] as well.

In *Spano,* for example, the petitioner was questioned for eight hours by skilled policemen and prosecutors and by a friend who was also a policeman. The "friend" intimated to the petitioner that if the petitioner did not talk, the friend might lose his job. Under these circumstances the petitioner confessed.[21] After considering all these facts the Court concluded that "petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused . . ."[22] The methods here used to coerce a confession were in sharp contrast to those employed in *Brown,* but the Court recognized that the voluntariness test is not directed toward the means but the end:

> [A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.[23]

The court reached its decision after a close examination of the "totality of the circumstances." Particularly damaging was the fact that the confession was elicited after indictment and in the absence of counsel. The Court based its decision on "traditional principles" of the fourteenth amendment, thus declining to reach—for the meantime—petitioner's sixth amendment right to counsel argument.[24] Four concurring justices, however, felt that the petitioner's conviction should be reversed solely on the basis that, under these circumstances, his sixth amendment right to counsel had been denied.[25]

But in *Massiah v. United States*[26] a federal case, the sixth amendment applied directly and the Court reached the right to counsel argument avoided in *Spano. Massiah,* like *Spano,* involved a post-indictment setting. The only difference was that the petitioner's incriminating words were obtained through use of a hidden listening device. The Court,

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[19] Malloy v. Hogan, 378 U.S. 1 (1964).
[20] *Id.* at 7.
[21] 360 U.S. at 316-19.
[22] *Id.* at 323.
[23] *Id.* at 321.
[24] *Id.* at 320.
[25] *Id.* at 324-27, Douglas, J. (concurring) and Stewart, J. (concurring).
[26] 377 U.S. 201 (1964).

citing with approval the concurring opinions in *Spano,* held that the basic guarantee of the sixth amendment was denied the petitioner.[27]

The coercion may appear to be minor, as was the case in *Haynes v. Washington,*[28] a state prosecution. There the petitioner was told that he would be allowed to call his wife and an attorney after he "cooperated" and gave the police a statement.[29] The Court held that this was undue coercion and was sufficient to make the petitioner's confession involuntary.[30] The test applied was "whether the confession was obtained by coercion or improper inducement . . .", which "can be determined only by an examination of all of the attendant circumstances"[31]—another application of the totality of the circumstances test.

This, then, was the test of the admissibility of a confession prior to *Miranda.* Admissibility depended on whether the confession was given freely and voluntarily, and the voluntariness in turn depended on the totality of the circumstances. This test actually was abandoned before *Miranda* in the important case of *Escobedo v. Illinois.*[32]

B. Abandonment of the Voluntariness Test

As pointed out earlier, the Supreme Court avoided the sixth amendment right to counsel argument in the state prosecution of *Spano v. New York,* relying instead on the due process clause of the fourteenth amendment.[33] But in *Escobedo* the Court met the issue squarely and boldly abandoned the voluntariness test in favor of a limited sixth amendment formula.[34] In *Escobedo* the petitioner was arrested and subjected to extensive interrogation for four hours, while his attorney waited outside, unable to see his client. The petitioner several times requested that he be allowed to speak to his attorney, but his requests were denied. At the end of the four hours, he confessed.[35] Faced with this patent misconduct by police officers, the court instituted the following formula, limited apparently to *Escobedo*-type factual situations:

> [W]here . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular

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[27] *Id.* at 204-06.

[28] 373 U.S. 503 (1963).

[29] *Id.* at 504.

[30] *Id.* at 513-14.

[31] *Id.* at 513.

[32] 378 U.S. 478 (1964).

[33] 360 U.S. at 320.

[34] 378 U.S. at 490-91. *See* Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process—Part II,* 38 Miss. L.J. 57, 63-64 (1966).

[35] 378 U.S. at 479-83.

> suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the supect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' [citation omitted] and . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial.[36]

As the Court pointed out, the crucial issue was whether one who has requested and been denied an opportunity to confer with an attorney has been denied the assistance of counsel guaranteed under the sixth amendment and, to the states, under the fourteenth amendment.[37] The Court answered this question in the affirmative and prescribed the above test for future determinations of the admissibility of confessions. But this test was limited to factual situations similar to *Escobedo*—i.e., where the accused has requested and been denied the opportunity to talk to an attorney—until *Miranda* answered the questions left unanswered by *Escobedo*.

Miranda was one of four companion cases decided by the Supreme Court. Each of the four cases shared certain "salient features," among them "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."[38] In *Miranda* the petitioner was arrested and taken to a special isolated interrogation room where he was questioned, in the absence of counsel, until a confession was obtained from him.[39] While noting the fact that modern custodial interrogation is "psychologically rather than physically oriented,"[40] the Court found that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[41] The practice of incommunicado interrogation, the Court further found, was inherently in conflict with the fifth amendment's rights to be free from self-incrimination.[42] This guarantee, plus the sixth amendment guarantee of the right to counsel, led the Court to establish the following pro-

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[36] *Id.* at 490-91.
[37] *Id.* at 479.
[38] 384 U.S. at 445.
[39] *Id.* at 456.
[40] *Id.* at 448.
[41] *Id.* at 455.
[42] *Id.* at 457-58.

cedural safeguards that must be followed before any interrogation can begin: (1) At the outset an accused must be advised in "unequivocal terms" that he has the right to remain silent; (2) he must also be informed that anything he says can be used against him in a court of law; (3) he must be advised that he has a right to consult with counsel and to have counsel present during any questioning; (4) he must be advised that if he cannot afford to retain counsel, counsel will be appointed by the court to represent him; and (5) he must be informed that if at any time prior to or during questioning he indicates that he wishes to remain silent, the questioning must stop.[43] These rights may be waived by a defendant, if his waiver is voluntary, knowing, and intelligent.[44] Absent such a waiver, however, the giving of these warnings is a prerequisite to admission into evidence of any statement made by an accused.[45]

Under the voluntariness test, the Court in effect was concerned with the trustworthiness of confession evidence. This inquiry was not abandoned by *Miranda;* rather, the Court widened its concern for reliability and trustworthiness by the addition of the procedural safeguards.[46] Nor did the Court intend to achieve reliability by impeding the work of law enforcement officers in their investigation of crimes,[47] although law enforcement officers reacted critically to the *Miranda* formula.[48]

Escobedo dealt the voluntariness test a staggering blow. With *Miranda* the voluntariness test was completely abandoned. Or was it? Was *Miranda* to be applied retroactively or was its application to be prospective only? This question was bound to arise and appear before the Court.

C. Application of *Miranda* Requirements to Issue of Voluntariness in Pre-*Miranda* Trials

One week after the Supreme Court decided the momentous *Miranda* case, it ruled in *Johnson v. New Jersey*[49] that both *Miranda* and *Escobedo* were to have prospective application only.[50] The chief basis of this

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[43] *Id.* at 467-74.
[44] *Id.* at 444.
[45] *Id.* at 476.
[46] *Id.* at 458.
[47] *Id.* at 477.
[48] *See* Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process—Part II,* 38 Miss. L.J. 57, 59 (1966).
[49] 384 U.S. 719 (1966).
[50] *Id.* at 721.

decision was that *Miranda* had not abolished the voluntariness test with respect to trials preceding its date of decision but had merely furnished *additional* safeguards to ensure "full effectuation of the privilege against self-incrimination . . ."[51] In other words, for those whose trials began before the *Miranda* decision, the voluntariness safeguard still would be available. But more importantly, the Court went on to add the following:

> Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, *the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.*[52] (emphasis added).

Although *Miranda* did not receive retroactive application, its impact still had a retroactive effect, for a petitioner not entitled to the protection of the *Miranda* safeguards nevertheless could argue that the absence of the *Miranda* warnings was an indication of the involuntariness of his confession. Choosing not to make *Miranda* retroactive in application, the Court thus did the next best thing. This limited formula—by which the *Miranda* safeguards became not a test in itself but a function of the old voluntariness test—will be important later in this discussion, because this same formula is the essence of Title II of the Omnibus Crime Control Act.

In the meantime, however, consideration must be given to the effect of the *Johnson* decision. On the same day that it decided *Johnson*, the Court decided the case of *Davis v. North Carolina*.[53] In this case the petitioner was convicted of rape and murder in state court and his conviction was affirmed on appeal to the highest state court. Having exhausted his state remedies, he sought a writ of habeas corpus in federal district court. His petition was denied, and on appeal the court of appeals reversed and remanded the case to the district court. The district court again denied the petition and on the second appeal the court of appeals affirmed.[54]

The Court clearly recognized its duty:

> We are not called upon in this proceeding to pass on the guilt or innocence of the petitioner of the atrocious crime that was committed. Nor are we called upon to determine whether the confessions obtained are true or false. [citation omitted].

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[51] *Id.* at 729-30.
[52] *Id.* at 730.
[53] 384 U.S. 737 (1966).
[54] *Id.* at 738-39.

> The sole issue presented for review is whether the confessions were voluntarily given or were the result of overbearing by police authorities.[55]

Since the trial in *Davis* took place prior to the decision in *Miranda*, the *Miranda* requirements were not applicable directly. But, in accordance with the *Johnson* formula, the Court reviewed the voluntariness of the confession in light of the *Miranda* safeguards:

> The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made.[56]

Upon its examination of the totality of the circumstances, the Court concluded that the petitioner's confession was not given freely and voluntarily but was the product of coercive pressures exerted against him. Therefore, his confession was inadmissible against him.[57]

In *Clewis v. Texas*[58] the petitioner was taken into custody early on a Sunday morning. Late in the afternoon of the next day he made his first statement to the police, and only then was he taken before a magistrate. He had slept very little, eaten only a small amount of food and appeared to be sick. He had established no contact with a lawyer. Between Monday and Thursday he was interrogated further, having denied his guilt despite his first confession. On Thursday he confessed a second time. Between Friday and the following Tuesday he was left alone, but on Tuesday the questioning resumed, the petitioner again denying his guilt. He still had not consulted with an attorney or been advised of his right to have one appointed. He confessed a third time.[59] Again, the Court noted that while *Escobedo* and *Miranda* did not apply directly they nevertheless were relevant to the issue of voluntariness.[60] These considerations led the Court to conclude that the petitioner's confession was involuntary:

> On this record, we cannot hold that petitioner's third statement was voluntary. It plainly cannot, on these facts, be separated from the circumstances surrounding the two earlier "confessions." There is here no break in the stream of events

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[55] *Id.* at 739.
[56] *Id.* at 740.
[57] *Id.* at 739, 752-53.
[58] 386 U.S. 707 (1967).
[59] *Id.* at 709-10.
[60] *Id.* at 709.

> from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before.[61]

The Court has continued to apply the formula first accepted in the *Davis* case—i.e., while *Escobedo* and *Miranda* are not controlling with respect to cases tried before their dates of decision, the safeguards erected by those decisions are relevant to the issue of voluntariness.[62] The collective effect of these cases is that the voluntariness test is still a vital force. The cases demonstrate, as one judge has noted, "that the Court is to some extent utilizing the totality of the circumstances doctrine to conform the pre-*Miranda* confession rules to the post-*Miranda* confession rule."[63]

This was the status of the law dealing with admissibility of confessions at the time the Omnibus Crime Control Act was passed. *Miranda*, of course, had broad implications with respect to the right to counsel, and this caused similar questions to be raised in other areas of custodial procedures, particularly those employed in lineups. The cases dealing with lineup identifications followed almost as a sequel to *Miranda*, broadening further the right to counsel safeguards. Title II was directed not only against the procedural safeguards set forth in *Miranda* but against those set forth in the lineup identification cases as well. For this reason, consideration also must be given to the extent of the latter decisions.

II. The Eyewitness Identification Problem

A. *Wade, Gilbert* and the Initial solution

Wade and *Gilbert* were decided on the same day by the Supreme Court. Both involved post-indictment, pre-trial lineups held in the absence of counsel. The sequence of events in *Wade* was as follows. A bank was robbed on September 21, 1964. An indictment was returned against Wade and others on March 23, 1965. Wade was arrested on April 2, 1965, and a lawyer was appointed on April 26 to represent him. Fifteen days later, without notice to Wade's lawyer, officers arranged for two eye-witnesses of the robbery to observe Wade and others in a lineup. Both eyewitnesses identified Wade as the bank robber. They confirmed their identification at trial.[64]

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[61] *Id.* at 710.

[62] Beecher v. Alabama, 389 U.S. 35 (1967); Greenwald v. Wisconsin, 390 U.S. 519 (1968); and Darwin v. Connecticut, 391 U.S. 346 (1968).

[63] Yates v. Breazeale, 402 F.2d 113, 121 (5th Cir. 1968), Hughes, J. (concurring in part and dissenting in part).

[64] 388 U.S. at 220.

The Court first rejected the fifth amendment argument that Wade's right against self-incrimination had been violated. It reiterated its position taken earlier in *Schmerber v. California*,[65] holding that the fifth amendment privilege "'protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . .'"[66] The Court went on to add:

> We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have.[67]

But the Court recognized that the sixth amendment right to counsel applies to "critical" stages of criminal proceedings and that a pre-trial confrontation between the accused with his accusser is such a "critical" stage:

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for *Wade* the post-indictment lineup was a critical stage of the prosecution at which he was as much entitled to such aid [of counsel], . . . as at the trial itself. [citation omitted]. Thus, both Wade and his counsel should have been notified of the impending lineup and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver."[68]

Significantly, *Wade* did not exclude, per se, the in-court identification, despite the absence of counsel at the pre-trial, out-of-court identification.[69] The Court reasoned that since admissibility of evidence of the lineup identification itself was not involved, such a rule would be justified. But the Court also realized that a rule "limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one."[70] The Court reached a syn-

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[65] 384 U.S. 757 (1966).

[66] 388 U.S. at 221. For the same language in *Schmerber*, see 384 U.S. at 761.

[67] 388 U.S. at 222.

[68] *Id.* at 236-37.

[69] *See* Note, *Right to Counsel at Pre-Trial Lineup*, 63 Nw. U.L. Rev. 251, 255 (1968).

[70] 388 U.S. at 240.

thesis by citing the test approved in *Wong Sun v. United States:*[71] "'[W]hether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"[72] To effectuate this test, the Court vacated Wade's conviction for the purpose of allowing the trial court to hold a hearing to determine whether the in-court indentifications had a source independent of the objectionable lineup identification or whether, in any case , introduction of the evidence was harmless error.[73]

In *Gilbert* nine witnesses identified Gilbert at trial and testified that they had also identified him at a pre-trial lineup.[74] The Court first held that admission of the in-court identifications "without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error."[75] In accordance with its holding in *Wade* the Court vacated Gilbert's conviction for the purpose of permitting the trial court to conduct a hearing at which the State would have the opportunity "to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error."[76]

An important distinction may be drawn at this point between *Wade* and *Gilbert.* Both cases of course involved pre-trial lineups and identification testimony at trial by witnesses who had observed the defendant at the earlier lineup. But only in *Gilbert* did these witnesses actually testify that they had identified the defendant at a pre-trial lineup. As mentioned earlier, *Wade* did not establish a per se exclusionary rule with respect to any out-of-court identifications, although the argument can be made that *Wade* in effect established such a rule by requiring proof of an independent source to "save" the in-court identification.[77] But *Gilbert,* which involved testimony relating to an out-of-court identification, did provide a per se exclusionary rule with respect to out-of-court identifications.[78]

In still another companion case to *Wade, Stovall v. Denno,*[79] the Court held that the rule announced in *Wade* and *Gilbert* was to be applied prospectively only. In that case a doctor was murdered and his

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[71] 371 U.S. 471 (1963).

[72] 388 U.S. at 241. For the same language in *Wong Sun,* see 371 U.S. at 488.

[73] 388 U.S. at 242.

[74] 388 U.S. at 269-70.

[75] *Id.* at 272.

[76] *Id.*

[77] *See* Note, *Right to Counsel at Pre-Trial Lineup,* 63 NW. U. L. REV. 251, 256 (1968).

[78] *Id.*

[79] 388 U.S. 293 (1967).

wife seriously wounded by a knife-wielding assailant. Less than twenty-four hours later the police arrested a suspect. Since the wife was in the hospital recovering from major surgery undertaken to save her life, the police as soon as possible took the suspect to her room for her to observe. She identified him as the attacker who had murdered her husband and wounded her. She identified him at trial and also testified regarding her hospital room identification.[80]

Although the Court held that *Wade* and *Gilbert* were to be applied only to cases involving confrontations after the dates of their decision, it also considered whether

> the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim.[81]

The Court pointed out that such a claim depends on the "totality of the circumstances."[82] The police here were faced with an urgent situation. Mrs. Behrendt was in very serious condition and no one knew whether she would live or die; certainly she was in no condition to come to the police station to observe a traditional lineup. Too, she was the only person who could exonerate the accused if indeed he were innocent. Under these circumstances the Court could not say that the defendant's rights were violated.[83]

The extent of application of the *Stovall* "totality of the circumstances" test has varied in the lower courts. The United States Court of Appeals for the Third Circuit, in a habeas corpus proceeding, has held that even though a petitioner's trial occurred many years before the *Wade*, *Gilbert* and *Stovall* decisions, he still is not precluded from arguing that the totality of the circumstances surrounding his lineup showed that the procedure was so unfair as to deprive him of a fair trial.[84] The court, after an examination into the facts of the case, concluded that his argument, though permissible, must fail:

> He never appeared alone in a lineup, nor did the police make any suggestions conducive to mistaken identification to witnesses. He was indeed required to repeat the words allegedly spoken by the holdup man, but the same requirement was imposed on the others in the lineup . . . .[85]

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[80] *Id.* at 295.
[81] *Id.* at 301-02.
[82] *Id.* at 302.
[83] *Id.*
[84] United States *ex rel.* Bennett v. Myers, 381 F.2d 814, 816 (3d Cir. 1967).
[85] *Id.* at 817.

Although the court found no error, the significance of this case is that the court permitted the petitioner to make the "totality of the circumstances" argument.

The Fifth Circuit, however, has treated the matter differently. In *Schmidt v. United States,*[86] the defendant argued that requiring him to appear in a lineup at a time when he was without counsel deprived him of his sixth amendment right to counsel. The court noted that the defendant's trial was held prior to the *Wade* and *Gilbert* decisions and that those decisions were to receive prospective application only, thereby precluding his making the sixth amendment right to counsel argument.[87] But the court stopped here, apparently overlooking, or ignoring, the language in *Stovall* that permits inquiry into the "totality of the circumstances" to determine if the identification procedure was so unfair as to deprive an accused of a fair trial.[88] These two decisions thus represent a conflict in regard to the intended scope of the *Stovall* decision. As yet this question remains unanswered, but perhaps the Supreme Court will resolve the conflict.

Generally, however, the rule that emerged from the *Wade, Gilbert,* and *Stovall* decisions is clear, at least on its face. Since a pre-trial lineup is a critical stage in a criminal prosecution, a defendant appearing in such a lineup must be represented by counsel who is present at the lineup, absent an intelligent waiver of such right by the accused.[89] If the lineup is held in the absence of counsel in violation of the accused's rights and the prosecution introduces identification evidence at trial, it must show that the in-court identification is based on a source independent of the lineup identification or it may later show that introduction of the identification evidence was harmless error.[90] In any event, testimony regarding the objectionable out-of-court identification will be excluded per se.[91] Although these rules will apply prospectively only, identifications occurring prior to *Wade* and *Gilbert* still must meet the "totality of the circumstances" test.[92]

Wade and *Gilbert* left some questions unanswered. They did not address themselves, for example, to the problem of on-the-scene identifications. The Court seemed to limit the rule to post-indictment situations, but its language probably was meant to have a descriptive effect

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[86] 380 F.2d 22 (5th Cir. 1967).

[87] *Id.* at 23.

[88] *See* 388 U.S. at 302.

[89] United States v. Wade, 388 U.S. 218, 236-37. (1967).

[90] *See* United States v. Wade, 388 U. S. 218, 242 (1967) *and* Gilbert v. California, 388 U.S. 263, 272 (1967).

[91] Gilbert v. California, 388 U.S. 263, 272-73 (1967).

[92] Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

rather than to limit the scope of its opinion.[93] Later decisions have enlarged the scope of the Court's inquiry, largely because the Court "was concerned with the potential for prejudice in pre-trial confrontations, not with whether they took place before or after indictment."[94]

Nor did *Wade* answer the question of whether the right to counsel attaches in the event a witness identifies a suspect from photographs supplied by the police rather than a lineup.[95] But this and other questions have been the subject of more recent cases that we will now examine.

B. The Aftermath of the *Wade-Gilbert-Stovall* Dilemma and the Answers to Some Unanswered Questions

Neither *Wade, Gilbert* nor *Stovall* involved the use of photographs by the police for identification purposes. This question was bound to arise and did so in the case of *Simmons v. United States.*[96] In that case, two men who robbed a bank were observed for a period of about five minutes by five bank employees. The day after the robbery, while the perpetrators were still at large, the police obtained snapshots of two men, one of whom was Simmons. They showed these snapshots, which included individual poses as well as group shots, to the five bank employees and each of them identified Simmons as one of the bank robbers. At trial the government did not introduce any of these photographs but relied only on the in-court identifications by the five eyewitnesses.[97]

On the basis of the *Wade* and *Gilbert* decisions, Simmons argued that under the circumstances the procedure employed was so unfair as fatally to taint his conviction.[98] The Court did not accept this argument, but held that

> each case must be considered on its own facts, and that convictions based on eyewitness identification . . . by photograph will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.[99]

This reasoning, said the Court, was in accord with its holding in *Stovall*

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[93] Note, *Right to Counsel at Pre-Trial Lineup,* 63 Nw. U. L. Rev. 251, 257 (1968).

[94] *Id.* at 257-58.

[95] *Id.* at 258.

[96] 390 U.S. 377 (1968).

[97] *Id.* at 380-81.

[98] *Id.* at 383.

[99] *Id.* at 384.

("totality of the circumstances" test).[100] Applying this standard to the present case, the Court found no improprieties:

> A serious felony had been committed. The perpetrators were still at large. . . . It was essential for the FBI agents swiftly to determine whether they were on the right track . . . .
>
> In the second place, there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh.[101]

Thus *Simmons*, unlike the *Wade-Gilbert* ruling, does not require a showing that the in-court identification has a basis independent of the viewing of the photographs. Rather, it poses a requirement essentially identical to that in *Stovall*—i.e., the "totality of the circumstances" test. The Court was concerned primarily with an inquiry into the trustworthiness and reliability of the identification itself, and to this extent its test seems adequate.

Another problem area not covered by *Wade, Gilbert* or *Stovall* but which also was bound to arise is the problem of on-the-scene identifications. The Supreme Court has not ruled on this question, but at least one state court of last resort has, in the case of *Commonwealth v. Bumpus*.[102] In this case, within minutes following a burglary, a suspect was picked up, arrested and taken immediately before the burglary victim. The victim identified the man as the burglar and this identification was introduced at trial. Following conviction the defendant appealed on the ground that his sixth amendment right to counsel had been denied in that he was not afforded counsel at the time of the identification.[103]

The state high court rejected his argument after reviewing, in accordance with *Stovall*, the "totality of the circumstances":

> Reasonable confrontations of this type, in the course of (or immediately following) a criminal episode, seem to us to be wholly different from post-indictment confrontations (such as those in the *Wade* and *Gilbert* cases) in serious crimes after a significant interval of time, and in the absence of already appointed counsel. The Supreme Court of the United States has not applied the principle of the *Wade* and *Gilbert* cases in such circumstances.[104]

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[100] *Id.*
[101] *Id.* at 384-85.
[102] 238 N.E.2d 343 (Mass. 1968).
[103] *Id.* at 343-44.
[104] *Id.* at 347.

This court also adopted the trustworthiness approach to the problem: "Certainly, while the events were very fresh in his mind, [the witness] was probably in a better position to have a clear recollection of the intruder than at any later time."[105]

Another question, although seemingly answered in *Stovall,* has continued to appear again and again—the problem of single suspect confrontations. The question recently was presented again to the Supreme Court in *Biggers v. Tennessee.*[106] The Court was equally divided on what result should be reached, which meant that the appellant's conviction was automatically affirmed, but a well reasoned dissent by Justice Douglas deserves comment here.

The victim, Mrs. Beamer, was assaulted in her home by a knife-wielding assailant, removed to a spot some two blocks away and raped. Her daughter also got a brief look at the attacker. About seven months passed during which police showed Mrs. Beamer pictures of various suspects, none of whom she could identify as the man who raped her.

After seven months had passed, however, police arrested the petitioner in connection with another rape. The police brought Mrs. Beamer to the station to look at him. She did not make an immediate identification but identified him only after she heard him speak. She did not identify him at trial. Her daughter testified at trial but could not identify petitioner as the assailant. The only evidence connecting the petitioner with the events of the crime was Mrs. Beamer's station house identification.[107]

Mr. Justice Douglas felt this identification procedure violated the standards of *Wade* and *Gilbert.* The reasons for upholding convictions in *Stovall* and *Simmons,* he pointed out, were valid:

> In *Simmons,* identification by use of photographs rather than a lineup was upheld because the bank robbers were still at large, the FBI had to quickly determine whether it was on the right track in looking for Simmons, the witnesses' memories were fresh since the robbery was but a day old, and because the photos pictured persons in addition to petitioner. In *Stovall,* a single-suspect confrontation held in a hospital room was found to comport with due process because the stabbing victim, the sole source of identification, was in danger of death—to have conducted a lineup would have entailed perhaps fatal delay.[108]

In *Biggers,* however, no urgencies compelled departure from use of the traditional lineup. And, as Mr. Justice Douglas added: "Whatever

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[105] *Id.* at 346.
[106] 390 U.S. 404 (1968).
[107] *Id.* at 405-06.
[108] *Id.* at 406-07.

may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carries a powerfully suggestive thought."[109]

Here, the best view that Mrs. Beamer had of the assailant was in a dimly lit hall. Her station-house identification occurred seven months after the incident occurred. Too, identification here was largely by voice, which involves " 'grave danger of prejudice to the suspect.' "[110]

Mr. Justice Douglas concluded that "the entire atmosphere created by the police surrounding Mrs. Beamer's identification was so suggestive that use at trial of her station-house identification constituted a violation of due process."[111] He seems to call for the in-depth inquiry into the "totality of the circumstances" that was present in *Stovall* and the concern with the reliability and trustworthiness of identification evidence that was present in *Simmons*. The Court seems to have turned away, however momentarily, from its search for trustworthiness, which must be considered a failing on the Court's part in light of the well-supported argument that eyewitness testimony is unreliable anyway.[112]

In *Rivers v. United States*,[113] a Fifth Circuit case, a result different from *Biggers* was reached. There the appellant allegedly shot and attempted to rob a mail carrier, who managed to get away and seek help. Within a few hours officers arrested appellant and two others and took them to the hospital for the wounded mail carrier to see. The mail carrier, who at the time was on a stretcher being wheeled into the hospital, identified appellant as the man who shot him. Although the issue was not raised at trial or on appeal, the court reversed the conviction because of "fundamental error of constitutional proportions of the *Wade-Gilbert-Stovall* type . . . ."[114]

The court admirably concerned itself with the propriety of the procedure employed and the trustworthiness of the identification elicited:

> [S]o far as the present record goes, there was time to provide counsel (or establish a purposeful waiver) and with counsel (or waiver) a lineup could have been held at the hospital with proper procedural safeguards.
>
> The inherent dangers of impromptu identifications such as the one here are well documented in *Wade*, and we see no need to go into them again. The opportunity for suggestive practices, either accidental or intentional, are ample. To the

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109 *Id.* at 407.
110 *Id.* at 408.
111 *Id.* at 408-09.
112 *See* P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965).
113 400 F.2d 935 (5th Cir. 1968).
114 *Id.* at 937.

> usual hazards must be added here the special danger to reliable identification from reliance on the judgment of a man just shot in the back of the head.[115]

The court also indicated a tendency to enlarge the scope of the *Wade-Gilbert* rulings:

> The decisions of the Supreme Court in *Wade* and *Gilbert* put it in terms of right to counsel. They held that confrontations between suspects and witnesses were a 'critical stage' of the criminal proceedings against an accused and counsel must be present at these confrontations unless waived. With *Miranda* on the books, it is indisputable that most, perhaps all, confrontations occurring after arrest will fall within the rules announced in *Wade* and *Gilbert*.[116]

The eyewitness identification problem was presented to the Mississippi Supreme Court in the recent case of *Short v. State*,[117] but the court side-stepped the question. The facts of the case are very similar to those in *Stovall*. The victim was assaulted as she sat in her parked automobile in front of a theatre where her sister worked. The assailant got into her car and ordered her to drive off. She began screaming and struggling with the attacker, and he cut her on the throat and stabbed her several times, breaking some of her ribs. He then jumped from the car and ran.

She was the only eyewitness to the brutal attack, and while she was in the hospital recuperating from her wounds, the police brought eight or nine young men into her room for her to observe. One of these was the appellant, whom she identified as the assailant.[118]

At trial, the victim made an in-court identification of the appellant but also was allowed to testify as to her hospital identification. The defendant alleged as error the hospital confrontation and identification held in the absence of counsel, and cited *Wade, Stovall* and *Biggers* to support his argument.[119] The issue was clearly before the court—a *Stovall*-type factual situation was present, together with the right to counsel problems of *Wade* and *Gilbert*, and the court had not spoken on the issue. But it chose to remain silent—at least for the meantime—on the problems raised by *Wade, Biggers* and *Stovall:* "[W]e do not reach the issues considered in those cases."[120] The court reversed Short's convic-

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[115] *Id.* at 940.
[116] *Id.* at 939.
[117] 211 So.2d 545 (Miss. 1968).
[118] *Id.* at 545-46.
[119] *Id.* at 546-47.
[120] *Id.* at 547.

tion on a basis similar to the one it sought to avoid, which indicates that perhaps the court should have addressed itself to the real issues of the case:

> In the case before us, the prosecution adduced the evidence of the hospital identification as part of its case in chief, the only purpose of which was to bolster the witness's 'in court' identification of appellant. . . . Its admission, under the circumstances in the record, was prejudicial error and requires that the case be reversed and remanded for another trial.[121]

The question again came before the Mississippi court recently in the case of *Poole v. State*.[122] In this case a woman, Mrs. Walker, observed two strangers—a man and a woman—enter the home of a neighbor who Mrs. Walker knew was away from home. She reported the incident to the neighbor, who in turn called the sheriff. The sheriff's men went to the house and discovered that it had been burglarized. They obtained from Mrs. Walker a description of the man and woman and the car they were driving. Relaying these descriptions to the neighbor, officers learned from her that the man's description fitted the appellant, who had been by her home looking for housepainting work. The appellant was later arrested and placed in jail. Officers asked Mrs. Walker to come down to the jail where they showed the appellant to her in a single-suspect "lineup." They told her his name and that he had been named by the neighbor after she was furnished Mrs. Walker's description. Mrs. Walker then identified him as the man she had seen at her neighbor's house. During this time, the appellant was without the assistance of counsel.[123]

The court could no longer avoid examination of the issues presented by *Wade, Gilbert* and *Stovall*. It noted that the single-suspect identification was an "illegal extra-judicial identification," but also noted that, unlike the trial in *Short*, the prosecution did not introduce any evidence relating to the "stationhouse" identification. Thus, the per se exclusionary rule did not apply, and the in-court identification was valid if based on some source independent of the tainted identification.[124] In *Wade* and *Gilbert*, the convictions were reversed so that the trial court could hold a hearing to make this determination. But here the court determined from the record that such an independent source was "well established."[125]

The above discussion of the *Wade, Gilbert* and *Stovall* decisions, plus the refinements brought about by the later cases, was necessary in

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[121] *Id.*
[122] 216 So.2d 425 (Miss. 1968).
[123] *Id.* at 425-26.
[124] *Id.* at 427.
[125] *Id.*

order to furnish the proper background for consideration of the effect of Title II of the Omnibus Crime Control Act. Likewise, the earlier discussion of *Miranda* and the demise and subsequent revival of the voluntariness test relating to the admissibility of confession evidence was extremely crucial to consideration of the effect of Title II.

III. Title II and the Scope of Its Applicability

The Omnibus Crime Control Act was signed into law on June 19, 1968, but its history goes back further. Because of rapid increases in the crime rate and violence in our large cities in July of 1965 the President appointed the National Crime Commission to study the matter. Following its report and recommendations the President in February of 1967 called upon Congress to enact a new legislation to help combat the growing menace of crime.[126]

But the President was not satisfied entirely with the end product that came out of Congress, for the Act far exceeded his original expectations. He was particularly unhappy with Title II.[127] The provision with respect to the admissibility of confessions was designed to overturn, in federal cases only, the *Miranda* and *Mallory* decisions and to reinstate the voluntariness-totality of the circumstances test.[128] The provision dealing with identification evidence was designed to overturn the *Wade* decision[129] and to make eyewitness testimony admissible—in federal cases anyway—regardless of the absence of counsel at a pre-trial lineup.[130]

But as the President pointed out while signing the bill, the provisions of Title II apply only to federal criminal prosecutions, which represent only seven per cent of the criminal felony prosecutions in the country.[131] This means that Title II *does not* apply to state prosecutions, which in turn means that *Miranda, Wade, Gilbert* and the other cases

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[126] Remarks of President Johnson on signing the Omnibus Crime Control and Safe Streets Act, June 19, 1968, in 4 Weekly Compilation of Presidential Documents 981 (June 24, 1968). *See also* the Presidents remarks to Congress in 3 Weekly Compilation of Presidential Documents 182-94 (February, 1967).

[127] 4 Weekly Compilation of Presidential Documents at 983.

[128] *See* 3 Crim. L. Rep. 1042 (June 12, 1968) and 36 U.S.L.W. 1197 (June 25, 1968).

[129] *See* 36 U.S.L.W. 1197 (June 25, 1968).

[130] *See* 3 Crim. L. Rep. 1042 (June 12, 1968).

[131] Remarks of President Johnson on signing the Omnibus Crime Control and Safe Streets Act, June 19, 1968, in 4 Weekly Compilation of Presidential Documents 983 (June 24, 1968).

previously discussed are still in effect in state criminal prosecutions. But what about the seven per cent of criminal cases to which Title II *will* apply?

In federal cases only, Title II restores the voluntariness test as the standard by which the admissibility of confessions is determined.[132] It also restores the totality of the circumstances test as the basis for determining voluntariness.[133] Among the circumstances that may be considered in determining voluntariness are several factors essentially identical to the warnings required by *Miranda.*[134] The difference here, as Title II points out, is that the presence or absence of any of these factors is not conclusive, as would be the case under *Miranda;* they are merely factors to be considered in the determination of voluntariness, which is the real test.[135] In this sense, the test created by Title II is identical to the one initiated by *Davis* for application to pre-*Miranda* trials—i.e., *Miranda* does not apply directly, but the safeguards created by *Miranda* are relevant to the issue of voluntariness. Under Title II a criminal defendant could argue the absence of the *Miranda* warnings as part of an involuntariness claim.[136]

Title II also states that a confession is not inadmissible solely because of pre-arraignment delay. The Supreme Court in *Mallory v. United States*[137] held that the petitioner's confession, made during a period of unwarranted delay between arrest and arraignment, was inadmissible against him. The Court earlier had held, in *McNabb v. United States,*[138] that unnecessary pre-arraignment delay alone was sufficient to invalidate a conviction, and the *Mallory* case merely extended this doctrine to cover confessions made during the period of delay. The reason for the *McNabb-Mallory* doctrine was simple—to discourage the

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[132] Pub. L. No. 90-351, §701(a) (June 19, 1968).

[133] *Id.*

[134] *Id.* "The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) *whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,* (4) *whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and* (5) *whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.*" (emphasis added).

[135] *Id.*

[136] *Id. Compare* Johnson v. New Jersey, 384 U.S. 719, 730 (1966).

[137] 354 U.S. 449 (1957).

[138] 318 U.S. 332 (1943).

police practice of rounding up suspects, or "prospects," and eliciting confessions from them to support probable cause for the arrest, in the absence of any other probable cause that would be acceptable to a magistrate.[139]

Since *McNabb* and *Mallory* were based on interpretation of a Federal Rule[140] they directly applied to federal cases only. But some states have statutes similar to the Federal Rule and have adopted an exclusionary rule similar to the *McNabb-Mallory* doctrine. Mississippi has such a statute,[141] and although the Mississippi Supreme Court apparently has adopted the spirit of *McNabb*,[142] it also has held that failure to bring an accused before a magistrate without unnecessary delay after his arrest does not entitle him to a directed verdict of not guilty.[143] With respect to the spirit of *Mallory*, while the court has held that delay in furnishing a preliminary hearing properly may be considered in determining the admissibility of a confession obtained during such unlawful detention,[144] it also has held that failure to bring an accused before a magistrate without unnecessary delay does not invalidate a confession freely and voluntarily made while the accused was in custody.[145] One would be warranted, therefore, in concluding that Mississippi has not adopted the *McNabb-Mallory* rule.

The United States Supreme Court has heard argument in *Palmieri v. Florida*,[146] in which the Court was urged to extend the *McNabb-Mallory* exclusionary rule to the states. Should the Court make such an extension, which presumably would be based on constitutional grounds rather than the Court's supervisory power over the lower federal courts, it would have no impact on the pertinent provisions of Title II, since by its terms Title II applies to federal criminal prosecutions only.

Although Title II was calculated to overturn the *Mallory* ruling, it did establish certain limitations. Pre-arraignment delay alone still may invalidate a confession *unless*

> [1] such confession is found by the trial judge to have been made voluntarily and [2] if the weight to be given the con-

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139 *Id.* at 343-44; Mallory v. United States, 354 U.S. 449, 455-56 (1957).

140 FED. R. CRIM. P. 5(a).

141 MISS. CODE ANN. §2473 (1956).

142 Sheffield v. Reece, 201 Miss. 133, 28 So.2d 745 (1947).

143 Harper v. State, 251 Miss. 699, 171 So.2d 129 (1965).

144 Tyson v. State 237 Miss. 149, 112 So.2d 563 (1959).

145 Parker v. State, 244 Miss. 332, 141 So.2d 546 (1962).

146 No. 131. See 37 U.S.L.W. 3189 (November 26, 1968) for a summary of the oral argument.

> fession is left to the jury and [3] if such confession was made or given by such person within six hours immediately following his arrest or other detention. . . .[147]

With respect to the six-hour limitation, Title II allows certain mitigating circumstances that may relax the time requirement.[148]

The foregoing discussion was designed to indicate—only superficially—the *intended* effect of Title II on the *Miranda, Wade* and *Mallory* decisions. Seven per cent is a small figure, but nevertheless, Title II ostensibly applies to the federal cases represented by this figure. But the President's remarks indicate that, in effect, Title II will not apply even to these cases:

> The provisions of Title II, vague and ambiguous as they are, can, I am advised by the Attorney General, be interpreted in harmony with the Constitution and *Federal practices in this field will continue to conform to the Constitution.*
>
> Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning of their constitutional rights. *I have asked the Attorney General and the Director of the Federal Bureau of Investigation to assure that these policies will continue.*[149] (emphasis added).

The only reasonable interpretation of the President's words is that federal officers have been instructed to continue operating under the *Miranda* (and probably *Mallory*) requirements and to refrain from use of a confession that would be permitted under Title II but prohibited by these decisions. The President's remarks also can be interpreted to mean that federal officers have been instructed to refrain from use of eyewitness identification testimony that does not conform to the standards required by *Wade, Gilbert* and subsequent cases. If this is true, then the effect of Title II will be nil for the following reasons: (1) on its face it does not apply to state prosecutions; (2) it applies only to federal prosecutions, which represent only seven per cent of criminal felony prosecutions; and (3) it will not apply even to this small number since the President has not elected to proceed under the authority of the Act. What an impact the non-impact of the Act will have!

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[147] Pub. L. No. 90-351, § 701(a) (June 19, 1968).

[148] *Id.* "[T]he time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer."

[149] Remarks of President Johnson on signing the Omnibus Crime Control and Safe Streets Act, June 19, 1968, in 4 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS at 983 (June 24, 1968).

Yet, this seems to be a reasonable conclusion. The President expressed much dissatisfaction with Title II and other parts of the Act, but yet he signed it into law. Why? Perhaps his own words give some indication of his reason:

> The measure before me carries out many of the objectives I sought. But it also contains several other provisions which are unwise and which will not aid effective law enforcement.
>
> Over the past 10 days, I have given full consideration to this intricate, 110 page bill. I have carefully weighed the good features against the undesirable, the questions of law and policy it raises against the remedial actions I might take to resolve those questions, the immediate crisis of local law enforcement against the bill's response.
>
> My decision has been made only after consulting with the wisest counselors available to the President. . . . No department has recommended veto. On the basis of their advice and my own searching examination, I have decided that this measure contains more good than bad and that I should sign it into law.[150]

The President was highly pleased with Title I, dealing with aid to local law enforcement, and partially pleased with Title III, dealing with wiretapping controls, and Title IV, the gun control section.[151] In order to effectuate these provisions, he would have to sign the Act, but to do so would also set in motion the features he felt were undesirable. He could sign the Act safely, however, knowing that he could issue a directive to the Department of Justice to the effect that no federal authorities should use confession evidence not meeting the requirements set forth in *Miranda* or identification evidence not conforming to the requirements of *Wade* and *Gilbert*—hence his language that "Federal practices in this field will continue to conform to the Constitution."[152] In light of the President's statement that he had issued such a directive, Title II in effect is a nullity.

Perhaps this is just as well, for the minority report of the Senate Judiciary Committee, which reported the bill to the Senate, indicated that certain members of the minority believed that portions of Title II were in clear conflict with *Miranda* and would "almost certainly" be held unconstitutional.[153] The basis for their belief has merit:

> The Court emphasized in *Miranda* that the procedural safeguards established in the case are in addition to the tra-

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[150] *Id.* at 981.

[151] *Id.* at 981-83.

[152] *Id.* at 983.

[153] S. Rep. No. 1097, 90th Cong., 2d Sess. 147 (1968).

> ditional voluntariness test. Since section 3501 specifically dispenses with these safeguards and in lieu thereof establishes voluntariness as the sole test of the admissibility of a confession, the section is obviously contrary to the Constitution.[154]

The minority further pointed out that the Court had "made clear" in its opinion "that its holding was firmly grounded on a constitutional basis that no legislature could overrule."[155] The minority then quoted from the *Miranda* opinion to buttress its view:

> 'Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described [in the Court's holding] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. . . . *Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.*'[156]

The Court was clear in its warning, and as the minority pointed out, the provisions of Title II "can hardly be characterized as 'other fully effective means,' since the means chosen . . . are manifestly less effective than the safeguards announced in *Miranda*."[157]

The minority was less persuasive, however, in its derogation of the portion of Title II designed to repeal *Mallory*. The majority, citing such eminent authorities as Judge Alexander Holtzoff and Attorney General Thomas C. Lynch of California, pointed out that the *Mallory* rule was not founded on any constitutional principal but was a procedural matter, an exercise of the Supreme Court's supervisory power over the lower federal courts. Therefore, said the majority, no constitutional barrier was posed against abrogation of the *Mallory* rule.[158] The majority summarized its position as follows:

> Enactment of the provisions of subsections 3501 and 3502 would assign proper weight to the *Mallory* rule. Delay in bringing a suspect before a committing magistrate would be a factor to consider in determining the issue of voluntariness, but it would not be the sole criterion to be considered—operating to automatically exclude an otherwise competent confession.[159]

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[154] *Id.* at 149.

[155] *Id.*

[156] *Id.* See Miranda v. Arizona, 384 U.S. 436, 490-91 (1966), for the language quoted.

[157] S. REP. No. 1097, 90th Cong. 2d Sess. 149 (1968).

[158] *Id.* at 40.

[159] *Id.* at 40-41.

The minority objected to the overturning of the *Mallory* rule for essentially the same reasons given by the Court as the basis for the *Mallory* decision. The minority feared that this provision of Title II would "encourage prolonged and indefinite incarceration and interrogation of suspects, without opportunity to consult with friends, family, or counsel."[160] The reasoning of the minority, when added to the justification by the Court of the *Mallory* decision, has much merit, although not quite so much as its argument against the provisions that would overturn *Miranda.* Because *Miranda* was founded on constitutional principles, how the Court might treat legislation designed to overturn *Miranda* is almost certain;[161] because *Mallory* was based on policy, rather than constitutional, considerations, how the court would treat legislation designed to overturn *Mallory* is not so predictable.[162]

The minority also believed that the portion of Title II dealing with the admissibility of eyewitness testimony, would "almost certainly be held unconstitutional."[163] The report went on to add:

> The section dispenses with the procedural safeguards established in *Wade* for police lineups and is therefore in clear conflict with the requirements of the Constitution announced by the Supreme Court. In addition, section 3503 does not even attempt to establish effective alternative safeguards for lineups in lieu of the requirements of *Wade.* Instead, the section is a blanket provision making eyewitness testimony admissible in all circumstances, whether or not even the most fundamental and time-honored requirements of due process have been met in the identification, let alone the requirements of the right to counsel under the sixth amendment.[164]

While the majority insisted that the *Wade* ruling had "struck a harmful blow at the nationwide effort to control crime,"[165] the minority maintained that the *Wade* requirements were "unlikely to cause an undue burden on law enforcement."[166] The latter conclusion seems the more likely. Admittedly, the use of lineups is "an essential prosecutorial tool" as the majority claimed,[167] but one finds difficulty in determining what possible objection law enforcement officers could have to the requirement that counsel be present at any lineup. As the minority points out:

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160 *Id.* at 153.
161 *Id.* at 148-49.
162 *Id.* at 40-41.
163 *Id.* at 154.
164 *Id.*
165 *Id.* at 53.
166 *Id.* at 155.
167 *Id.* at 53.

> The requirement of *Wade* that a suspect is entitled to the presence of counsel at a lineup is well-calculated to eliminate the possibility that unfair procedures will lead to mistaken eyewitnesses identifications or the conviction of innocent persons.[168]

Too, as the minority further indicated:

> The Supreme Court suggested that a variety of procedures could conveniently be used by law enforcement officers to assure fair and impartial lineups. It also suggested appropriate alternative procedures that could be used in circumstances where the presence of a suspect's counsel at a lineup was likely to cause prejudicial delay or obstruction of the confrontation.[169]

In spite of the fervent debate on both sides, however, the constitutional conflict, unlike the "great train wreck," has not been imminent because of the President's stated policy with respect to recognized constitutional standards.[170] But a new president might take a different view of Title II and authorize the Department of Justice to proceed under its provisions. A ventured guess, however, is that this course of action is not likely to occur, in light of long-standing federal practices to the contrary.[171]

The foregoing discussion may be summarized briefly. Title II does not apply to state court prosecutions, which make up the large majority of the prosecutions in the United States. Title II applies only to federal prosecutions, which comprise only about seven per cent of the criminal felony prosecutions in the country. The President has indicated that the federal government will adhere to the constitutional requirements of the cases in force prior to the Act. And even if a new president decides to proceed under Title II, chances are great that significant portions of Title II, if not the entirety, will be declared unconstitutional by the Supreme Court. In any event, Title II seems destined for the legislative boneyard, barring any significant change in the make-up of the Supreme Court that would bring about a reversal or moderation of current trends in the area of criminal law. Title II seems to have plagued its creators, much in the same way as the great master Shakespeare envisioned:

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168 *Id.* at 155.

169 *Id.*

170 *See* Remarks of President Johnson on signing the Omnibus Crime Control and Safe Streets Act, June 19, 1968, in 4 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS at 983 (June 24, 1968).

171 S. REP. No. 1097, 90th Cong., 2d Sess. 151 (1968). "Essentially the same warnings required by the Supreme Court in *Miranda* were being used by the FBI 14 years before the decision in that case." *Id.*

But in these cases
We still have judgment here; that we but teach
Bloody instructions, which, being taught return
To plague the inventor; this even-handed justice
Commends the ingredients of our poison'd chalice
To our own lips.

Macbeth (I vii 7)

Samuel M. Davis

DEFEATING THE INHERITANCE OF THE SURVIVING SPOUSE

Introduction

In spite of the elaborate protection given to the surviving spouse by early common law, in most jurisdictions today she[1] is left with slight protection. Her great strides toward emancipation and attaining the right to vote make this loss of protection even more striking. The thinking seems to be that as a woman finds her place in the world, she is no longer entitled to be sheltered by the law.

This questionable premise has resulted in a rather extraordinary body of decisions allowing the husband to effectively disinherit the wife even though the statutes seem to dictate a contrary result.

I. Common Law Protection — Dower

Although the widow was never heir to her husband's land at common law, she was entitled to her dower which was a life estate in one-third of the lands of which the husband was seised during coverture.[2] She did not come into enjoyment of her interest until the death of the husband, but her protected expectancy, called inchoate dower, did amount to an incumbrance which prevented the husband from defeating her claim by alienation[3] or devise.[4] Any grantee or devisee of the husband took subject to the widow's dower rights so that she could not lose her interest without her consent.[5]

There were no restrictions upon the husband's alienation of his personal property whereas the widow's personalty belonged to the husband as an incident of the marriage. Except for the wife's life interest in one-third of the husband's realty and the husband's life interest in all the wife's realty, the real property of both spouses passed to their blood relatives upon death.[6]

Clearly the purpose of dower was to protect the surviving spouse against the conveyance, the will, and the debts of the other spouse.[7] It is also clear that when land was the principal source of wealth, dower was

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[1] Many of the principles discussed in this comment apply with equal force to the surviving husband.

[2] 2 Blackstone, Commentaries *129.

[3] 3 C. Vernier, American Family Laws § 200 (1935).

[4] *Id.* at § 199.

[5] T. Atkinson, Wills § 29 (2d ed. 1953).

[6] Sayre, *Husband and Wife as Statutory Heirs*, 42 Harv. L. Rev. 330 (1929).

[7] T. Atkinson, Wills § 30 (2d ed. 1953).

an adequate device for assuring the widow some means of support at the husband's death.[8] Perhaps today it is no longer so well suited for that purpose.

II. Statutory Protection

The objections to the retention of common law dower are of two distinct strains. The first is that dower affords inadequate protection to the surviving widow.[9] The second is that dower seriously imperils commercial transactions in a modern world and is an undue restraint on the free alienation of property.[10] In support of the first argument, one may note that in today's society of urban living where the average person owns no real property except a single residence, but has his wealth in personal property, it is apparent that dower is indeed an inadequate means of protection. Too, since dower admittedly impedes the ready transfer of real property and jeopardizes titles, the interests of the wife had to be balanced with those of commerce. The interests of commerce outweighed those of the wife and led to the abolition, or alteration, of dower as it was known at common law.[11]

England made its first statutory restriction on dower by restricting it to the lands of which the husband died seised[12] rather than those of which he was seised at any time during coverture. Finally, in 1925, England abolished dower and curtesy generally.[13]

Contrary to England's abolition, the essential features of common law dower have been preserved in about one-half of the jurisdictions of the United States. Besides these jurisdictions, several states, while purporting to abolish dower, have provided for a statutory scheme providing the wife with an absolute share of her husband's estate upon his death, but at the same time preserving for her an inchoate interest in his realty similar to common law inchoate dower.[14] A considerable number of the remaining jurisdictions effectively have abolished most vestiges of common law dower by substituting a scheme whereby the widow becomes a forced heir, taking an absolute share of the property owned by her husband at his death.[15]

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[8] For a thorough discussion of dower see 1 American Law of Property §§ 5.1-5.49 (A.J. Casner ed. 1952).

[9] T. Atkinson, Wills § 30 (2d ed. 1953).

[10] Cahn, *Restraints on Disinheritance*, 85 U. Pa. L. Rev. 139, 151 (1936) [hereinafter cited as *Restraints on Disinheritance*].

[11] *Id.*

[12] 3 & 4 Will. 4, c. 105, § 4 (1834).

[13] Administration of Estates Act of 1925, 15 Geo. 5, c. 23, § 45(1) (b)-(c).

[14] 1 American Law of Property § 5.1 (A.J. Casner ed. 1952).

[15] *E.g.*, Miss. Code Ann. §§ 453, 470 (1956).

In Mississippi it seems the only remaining vestige of dower is the statute[16] requiring the joinder of the wife in the "conveyance, mortgage, deed of trust or other incumbrance upon the homestead." In this regard it has been held that the conveyance of the homestead by the husband, without his wife's joinder, conveys no estate whatever.[17]

After abolishing dower,[18] Mississippi made the surviving spouse a forced heir by granting to the widow a child's part of the husband's entire estate, both real and personal, in fee simple. If there are no surviving children, then the widow is entitled to the entire estate in fee-simple.[19] Since the statute[20] applies only if the husband dies intestate, the husband readily could disinherit the wife by failing to make provision for her in his will. In order to restrain such a disinheritance by will, the legislature provided that if the husband fails to make satisfactory provision for the wife in his will, she may renounce the will and take the share to which she would have been entitled had he died intestate, but in no event may the wife take more than one-half of his estate.[21] "Satisfactory provision" means the share the widow would have received if the husband had not made a will.[22]

In summary, the Mississippi statute abolished dower, made the surviving spouse a forced heir of the decedent, and thereby guaranteed to her a share of the husband's estate so that he may not defeat her rights by a testamentary disposition.

III. Inter Vivos Disposition

Notwithstanding the precautions taken to prevent the husband from disinheriting the surviving widow by will, she is afforded essentially no protection against his inter vivos disposition of the property and her resulting disinheritance. This lack of protection results from the statutes giving the widow an interest only in the husband's estate—i.e., property which belongs to the decedent at the time of his death.[23] If the husband sells the property or gives it away during his lifetime, the wife's expectant property right never ripens since the property is not included in the estate of her husband.

Generally, legislatures have not seen fit to protect this distributive share from inter vivos transfer. It has been suggested that this is due

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[16] Miss. Code Ann. § 330 (1956).
[17] McKenzie v. Shows, 70 Miss. 388, 12 So. 336 (1892).
[18] Miss. Code Ann. § 453 (1956).
[19] Miss. Code Ann. § 470 (1956).
[20] *Id.*
[21] Miss. Code Ann. § 668 (1956).
[22] *See* Norfleet v. Callicott, 90 Miss. 221, 43 So. 616 (1907).
[23] Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

partly to an unwillingness to interfere with the free alienation of property, and partly to a belief that a man's hesitancy to impoverish himself during his lifetime will overcome any desire he might have to impoverish his widow after his death.[24] The second justification is subject to grave doubts when consideration is given to the practice of retaining all the incidents of ownership after an inter vivos transfer. If the grantor is able to retain the income and enjoyment from the property, he no longer need contend with the problem of impoverishing himself.

A Mississippi case illustrating the widow's entitlement only to a share of the property owned by the husband at his death is *Jones v. Somerville*.[25] In this case decedent, shortly before his death conveyed about two-thirds of his fortune to his daughter by a former marriage, reserving to himself the possession, income, and profits until his death. Decedent had made a will providing for the wife in her intestate share. The widow attacked the conveyance to the daughter claiming that its value should be included in the husband's estate. In response to this attack the court said.

> The only feature in reference to the property of the husband or wife in distinction from the property of any other person is that each inherits from the other a child's part of everything owned at death. . . .[26]

Here the Mississippi court refused to grant any relief to the disinherited widow since the property conveyed to the daughter was no longer in the husband's estate at his death.

Shortly after *Jones v. Somerville,* there arose in Alabama a case[27] in which the decedent had transferred six $1,000 bonds to his brother as trustee. In response to the widow's attempt to recover the bonds, the Alabama court aligned itself with the holding in *Jones v. Somerville* saying:

> It is difficult, then, to conceive how a disposition of property, made in the lifetime of the husband, and to take effect immediately, could be fraudulent against the wife, as no right whatever vests in the wife until his death. Her title . . . has no existence whatever until his death.[28]

The above cases demonstrate that the courts have no intention of closing the gap left by the legislature. A husband may do inter vivos

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[24] Comment, *The Present Status of "Illusory Trusts"—The Doctrine on Newman v. Dore Brought Down to Date,* 44 MICH. L. REV. 151 (1945).

[25] 78 Miss. 269, 28 So. 940 (1900).

[26] 78 Miss. at 272-73, 28 So. at 940.

[27] Robertson v. Robertson, 40 So. 104 (Ala. 1905).

[28] *Id.* at 106.

what he is forbidden to do by will, and it is clear that his efforts will not be thwarted as being a fraud on the wife's property right since she has no such right until his death.

IV. Devices Used to Accomplish the Inter Vivos Transfer

A. Living Trust

Among the several means of defeating the rights of the surviving spouse by inter vivos transfer, the living trust has produced the greatest amount of litigation. It is settled that if the trust is irrevocable, the surviving spouse is not entitled to a distributive share.[29]

The litigation arises in the cases where the settlor has retained the right to revoke the trust or has retained other incidents of ownership. Several grounds have arisen as bases for attack by a surviving spouse. Among these grounds are: the settlor has committed a fraud on the surviving spouse;[30] he is attempting inter vivos what he is not permitted to do by will;[31] the trustee is merely an agent of the settlor;[32] the transfer was colorable;[33] the settlor has not departed with dominion or control;[34] and, the transfer is not merely revocable but is illusory.[35] The above grounds are surely nothing more than various means of expressing disagreement with a policy that allows a husband to alienate his property during his lifetime to the exclusion of his widow.

Those courts using fraud as a test for determining whether a challenged transfer will be upheld are of necessity using the term "fraud" imprecisely, since reliance, a necessary element of fraud, is missing.[36] As to property owned by the decedent prior to marriage, and in which the surviving spouse had a legitimate expectant interest, there could be a proper allegation of fraud since the surviving spouse may have relied upon that property in consideration of the marriage. Since dower, the common law equivalent of today's statutory share, applied only to lands acquired during coverture,[37] it is inappropriate to use fraud when speaking of defeating the statutory equivalent of dower.[38]

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[29] 1 A. Scott, Trusts § 57.5 (1967).

[30] Payne v. Tatem, 236 Ky. 306, 308, 33 S.W.2d 2, 3 (1930).

[31] *See, e.g.*, Wright v. Holmes, 100 Me. 508, 62 A. 507 (1905).

[32] *In re* Pengelly's Estate, 374 Pa. 358, 97 A.2d 844 (1953).

[33] Mushaw v. Mushaw, 39 A.2d 465 (Md. 1944).

[34] *See, e.g.*, Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 163 N.E.2d 702 (1959), *rev'd on appeal*, 179 N.E.2d 60 (1961).

[35] Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

[36] *Restraints on Disinheritance* 151.

[37] 2 Blackstone, Commentaries *129.

[38] *Restraints on Disinheritance* 151.

Even within these "fraud" jurisdictions, there is a wide divergence in view. In a leading case, *Payne v. Tatem*,[39] the Kentucky court said:

> [W]hile the wife cannot complain of reasonable gifts or advancements by a husband to his children by a former marriage, yet, if the gifts constitute the principal part of the husband's estate and he made them without the wife's knowledge, a presumption of fraud arises, and it rest upon the beneficiaries to explain away the presumption.[40]

This language has been said to mean that if the transfer is made with the intent to deprive the spouse of her expectant interest, then such intent constitutes fraud.[41] In this respect, the case is out of harmony with the other "fraud" jurisdictions.

In *Kerwin v. Donaghy*[42] the opposite view was taken even though Massachusetts has been considered to be aligned with Kentucky.[43] The facts in *Kerwin v. Donaghy* were that a lawyer had advised decedent that a will would be ineffective to pass property to his daughter to the exclusion of his second wife. To accomplish this purpose decedent executed two trust agreements conveying to his daughter as trustee a large number of stocks, bonds and bank deposits, reserving to himself the income for life and directing his daughter to pay the principal to herself at his death. Decedent had further retained the right to alter, amend or revoke the trust agreements. When his widow attacked these trusts, the court refused to hold that this property should be included in her distributive share:

> In this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions, . . . under his will, or by virtue of a waiver of his will. *That is true even though the sole purpose was to disinherit her.*[44] (emphasis added).

It would seem, therefore, that mere intent to defeat the spouse's share is not enough for fraud. There must be a showing of actual fraud, which, according to the majority view, is an attempt to destroy the widow's share by a colorable transfer.[45] To say that a conveyance must not be

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[39] 236 Ky. 306, 33 S.W.2d 2 (1930).

[40] 236 Ky. at 308, 33 S.W.2d at 3.

[41] T. Atkinson, Wills § 32 (2d ed. 1953).

[42] 59 N.E.2d 299 (Mass. 1945).

[43] *See* Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 163 N.E.2d 702 (1959), *rev'd on appeal*, 179 N.E.2d 60 (1961).

[44] 59 N.E.2d at 306.

[45] *Restraints on Disinheritance* 151.

colorable means merely that it "must be one legally binding on the settlor or donor, accomplished in his lifetime, and not testamentary in its effect. In other words, it must be an actual conveyance or gift."[46]

Another argument pressed on behalf of the disinherited widow is that since the statutes allow the widow to renounce a will which makes unsatisfactory provision for her,[47] the husband should not be permitted to do inter vivos what he cannot do by will. In *Wright v. Holmes*,[48] the wife, prior to her death, had transferred nearly all her personal property so that her second husband was excluded from the administration of her estate. The Maine court never answered the husband's contention that she had accomplished inter vivos what she could not do by will, because the Maine statute did not give the husband a distributive share if he waived the will. The later case of *Bolles v. Toledo Trust Co.*[49] supported the proposition that an inter vivos disposition was against the policy of the statutes allowing the survivor to renounce the will if her share was unsatisfactory. *Bolles* was expressly overruled, however, in *Smyth v. Cleveland Trust Co.*[50]

The argument that a transfer is colorable and therefore a fraud on the spouse's share requires a determination of whether the settlor has relinquished dominion over the property. In *Mushaw v. Mushaw*[51] the husband placed substantially all his property in four savings account trusts just prior to his death. By the terms of the trusts, the beneficiaries, his children, could not withdraw any funds until after their father's death and the father could at any time set the transaction aside. The Maryland court considered this to be a retention of complete dominion and sustained the widow's attack on the trusts. The court was not content to rest its decision on the settlor's retention of dominion, however, but also relied on the fact that "the only possible reason for [the trusts] was to effect a transfer to the persons named in the will, unencumbered by the right of renunciation."[52] This language is quite similar to that used by the Kentucky court in *Payne v. Tatem* in that the language refers to the husband's intent to defraud the spouse making the transfers colorable and, hence, a fraud upon the marital rights of the widow.

The real difficulty in trying to reconcile the decisions in those jur-

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[46] Kerwin v. Donaghy, 59 N.E.2d 299, 306 (Mass. 1945).

[47] *See, e.g.*, MISS. CODE ANN. § 668 (1956).

[48] 100 Me. 508, 62 A. 507 (1905).

[49] 144 Ohio St. 195, 58 N.E.2d 381 (1944).

[50] 172 Ohio St. 489, 179 N.E.2d 60 (1961).

[51] 39 A.2d 465 (Md. 1944).

[52] *Id.* at 468-69.

isdictions[53] which employ the "fraud" test is that some cases indicate that intent to defeat the interest of the surviving spouse is sufficient to constitute fraud,[54] whereas others require a showing of actual fraud, a colorable transfer, regardless of the intent of the settlor.[55] Even within the latter category, there is room for a wide disparity of views as to when the transfer is merely colorable or whether the settlor has relinquished sufficient dominion over the property so that the transfer is actual rather than feigned.

Since a settlor's motive or intent was an unsatisfactory test and the concept of dominion was so evasive that settlors were virtually free to disinherit their widows at will, it was felt that a more clearly defined test should be employed to ascertain whether the widow could successfully attack the inter vivos trusts which effectively disinherited her from her husband's estate. The New York Court of Appeals is credited with the development of a standard which, hopefully, is more workable. In *Newman v. Dore*[56] the decedent three days before his death had executed trust agreements by which he transferred to trustees all his real and personal property. He had further complied with the applicable New York statute on descent and distribution[57] by naming his wife under his will as beneficiary of one-third of all his property, both real and personal. If the trusts had been held effective, decedent would have left no estate and the widow would have taken nothing at all.

Upon the widow's challenge to the validity of the trusts, the court rejected the "intent to defraud" test even though it found such intent present in the case before it. After reviewing the law giving to the wife only an expectant interest in her husband's property and noting that the law did not restrict transfers of property by the husband during his life, the court felt "the only sound test of the validity of the challenged transfer is whether it is real or illusory."[58] Recognizing that the test generally applied was whether the settlor had in good faith divested himself of ownership of his property or had made an illusory transfer, the court said "the 'good faith' required of the donor or settlor in making a valid disposition of his property during his life does not refer to the purpose to affect his wife but to the intent to divest himself of the

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[53] Vermont, Florida, Kentucky, Massachusetts, Arkansas, Michigan and Maryland require a showing of fraud. *See* Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 163 N.E.2d 702 (1959), *rev'd on appeal,* 179 N.E.2d 60 (1961).

[54] *E.g.,* Payne v. Tatem, 236 Ky. 306, 33 S.W.2d 2 (1930).

[55] *E.g.,* Kerwin v. Donaghy, 59 N.E.2d 299 (Mass. 1945).

[56] 275 N.Y. 371, 9 N.E.2d 966 (1937).

[57] N.Y. Decedent Estate Law §§ 18, 83 (McKinney 1939).

[58] 275 N.Y. at 379, 9 N.E.2d at 969.

ownership of the property."[59] Although the court was careful not to say what incidents would amount to retention of ownership in a general case, the court felt that the settlor had never intended to divest himself of his property and therefore termed the trust before it as illusory.

A quick review of the cases employing the "illusory transfer" test will lead to the conclusion that it is but a minor improvement over its predecessors. As is so often the case, it is merely a substitution of one unascertainable standard for another.

The precise question of the use of the revocable inter vivos trust to defeat the inheritance of the surviving spouse has never come before the Supreme Court of Mississippi. There is, however, considerable authority by which one may speculate as to the position the Mississippi court would take. In *Cameron v. Cameron*[60] the court announced the policy that the voluntary conveyance of the husband would be valid against the claims of the widow. In that case decedent had executed a trust deed of his personal property to a trustee who was to convey to decedent's two children at his death. During his lifetime, the decedent reserved to himself the use, possession and control of the property, including its proceeds and natural increase. If the children were to predecease the settlor, title was to revert to the settlor. Upon an attack by the widow, the court said:

> In a case of this kind, the only inquiry need be whether the deed of the husband is absolute and *irrevocable* or not. It is the undoubted right and privilege of a husband to dispose of his *personal* estate in any manner he thinks proper in his own lifetime, and to thus cut off his widow from dower in such property; and a voluntary conveyance will be good against the claims of the widow.[61] (emphasis added).

It seems that the court did not make its ruling applicable to the revocable trust, but the power of revocation was essentially the only incident of ownership not reserved by the settlor. Furthermore the court restricted its holding to the personal property of the husband. Since common law dower had not been abolished[62] at the time of the decision, the court's restriction to personal property may not be too significant.

In the landmark case of *Newman v. Dore* the New York court cited *Cameron v. Cameron* as authority for the proposition that the trusts should be upheld regardless of their purpose even where a husband

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[59] *Id.*

[60] 18 Miss. (10 S. & M.) 394 (1848).

[61] *Id.* at 397.

[62] MISS. CODE ANN. § 453 (1956). This section first appeared as § 1170, Code of 1880.

retained the right to enjoy the income during his life. It was not cited as authority for using a revocable trust to defeat the widow's claims even though such was the holding in *Newman v. Dore.*

If one views the power to revoke as the single most significant incident of ownership, then Mississippi's position could be that a revocable trust will not defeat the spouse's claim, whereas an irrevocable trust is valid even though the settlor retains virtually all the incidents of ownership. The relative weights to be assigned to the various indicia illustrate the difficulty of the "illusory transfer" test. Which one, or what combination, of the incidents of ownership will result in an illusory transfer if they are retained by the settlor?

The difficulty in assessing what facts will result in an illusory transfer is illustrated by the Illinois case of *Smith v. Northern Trust Co.*[63] There the husband had created a trust from which he was to receive the income for life, retain the right to demand invasion of the principal to maintain himself in his accustomed standard of living, and retain the right to alter, revoke or terminate the trust. Relying directly on *Newman v. Dore,* the court held "the transfer of title to the trustee, although absolute in form, was merely colorable and illusory."[64]

The inherent difficulty in determining whether a transfer is illusory, coupled with a public policy in favor of protecting the surviving spouse, has apparently led one legislature to declare the revocable trust ineffective against the election rights of the surviving spouse.[65] Although the statute was directed at the use of the "Totten" trust to defeat the rights of the widow, the language of the statute is clearly broad enough to cover any revocable trust. The statute provides that certain transactions which take place after the date of the marriage shall be treated as testamentary and their capital value shall be included in the net estate for the surviving spouse's election right. These transactions include:

> Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six, in trust or otherwise, to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person or persons . . . a power to revoke such disposition, or a power to consume, invade or dispose of the principal thereof.[66]

The New York legislation follows closely that enacted by Pennsylvania in 1947.[67]

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[63] 54 N.E.2d 75 (Ill. App. 1944).

[64] *Id.* at 78.

[65] N.Y. DECEDENT ESTATE LAW § 18(a) (McKinney Supp. 1967).

[66] *Id.*

[67] PA. STAT. ANN. tit. 20, § 301.11 (1950).

Since the Mississippi court has never been faced with the precise question, of the use of the revocable inter vivos trust to defeat the inheritance of the surviving spouse, there appear to be three avenues of approach which it could take: (1) It may follow the "illusory transfer" test and regard the revocable trust invalid only when the settlor has not sufficiently divested himself of the incidents of ownership; (2) it may align itself with those jurisdictions requiring actual fraud, i.e., a colorable transfer; or, (3) it may decide that the best policy is that promulgated by the legislatures of New York and Pennsylvania and judicially adopt that position so that the revocable trust would be ineffective to defeat the claim of the surviving spouse.

B. Life Insurance

Although there is scarcely any authority on the point, it seems clear that the husband could make an inter vivos disposition of his property through the use of life insurance and thereby defeat the rights of his widow in his estate. In *Mitchell v. Mitchell*[68] the husband changed the beneficiary on his life insurance policy from his wife to his mother. The court refused to include the proceeds as a part of the husband's estate so that the widow could claim her distributive share.

It is well settled that the beneficiary of a life insurance policy is entitled to the proceeds outside the administration of the insured's estate.[69] There is no reason to anticipate a different rule upon objection by the surviving spouse. Furthermore, there appears to be less reason for concern over the interest of the surviving spouse here since life insurance is more appropriately a means of increasing one's estate rather than depleting it.

C. Joint Ownership

At common law a grant to two or more persons was presumed to create a joint estate with the right of survivorship.[70] Since this was such a harsh presumption on the creditors and heirs of joint tenants, many states, including Mississippi, enacted statutes[71] reversing the common law presumption and denying the right of survivorship unless it is clearly expressed in the instrument.

Since it is well settled that the surviving spouse cannot elect against property held in joint tenancy, the use of duly perfected joint interests with one other than the spouse is a means of defeating the inheritance of

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[68] 290 N.Y. 779, 50 N.E.2d 106 (1943).

[69] T. Atkinson, Wills § 39 (2d ed. 1953).

[70] 2 Blackstone, Commentaries *180.

[71] *E.g.*, Miss. Code Ann. § 834 (Supp. 1966).

the spouse.[72] The same is true when a husband purchases United States Defense Bonds in his name payable on death to some third person. The widow is not entitled to include the bonds in determining her distributive share.[73]

Mississippi clearly has held that joint ownership may be used to defeat the spouse's share in the case of *Myers v. Laird*.[74] There the decedent had owned bonds jointly with her brother. The court rejected the husband's claim that the bonds should be included for the valuation of his wife's estate saying:

> These Series E Bonds were not a portion of her estate. Upon her death, the surviving co-owners of the bonds became the sole and absolute owners.[75]

D. Tentative Trusts

The use of the bank account trust has never been common in Mississippi or the South. This is largely because of the absence here of the strict savings banks so prevalent in the Northeast, particularly in New York City. These trusts usually arise when A deposits money in the style "A in trust for B."

There were initially several serious obstacles in the path of the bank account trust regarding the intent of the depositor and questions as to whether the Statute of Wills had been violated. Virtually all these objections readily could be overcome, save one. When the depositor retained the right to receive the interest, the transaction would not be testamentary.[76] If, however, the settlor also retained the right to withdraw any part of the principal, the orthodox view was that the Statute of Wills had been violated and the trust was invalid.[77]

Because it was felt that the depositor should also be allowed to withdraw the funds during his lifetime, New York established the tentative trust doctrine in the leading case of *In re Totten*.[78] In that case decedent had opened several savings accounts in her own name as trustee for her nephew. It had been her practice to open and close the accounts as she saw fit and to withdraw from them at will. The court held that the proper inference arising from this form of deposit was that the depositor intended to create a trust but intended to reserve the

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[72] *In re* Perlmutter, 199 Misc. 330, 98 N.Y.S.2d 968 (1950).
[73] Ibey v. Ibey, 93 N.H. 434, 43 A.2d 157 (1945).
[74] 230 Miss. 675, 93 So.2d 288 (1957).
[75] 230 Miss. at 683, 93 So.2d at 831.
[76] *E.g.*, Cazallis v. Ingraham, 110 Me. 240, 110 A. 359 (1920).
[77] *See, e.g.*, Springvale Nat'l Bank v. Ward, 122 Me. 227, 119 A. 529 (1923).
[78] 71 N.E. 748 (N.Y. 1904).

power during her lifetime to deal with the deposit in any manner she should choose. The court resolved the previous conflict when it announced the following conclusion:

> A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration. . . . In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.[79]

From this language the New York rule arises that a withdrawal by the depositor does not invalidate the trust, but rather it amounts to a revocation *pro tanto,* so that whatever balance remains at the death of the depositor passes to the beneficiary.

The pertinent question is whether these tentative trusts or "Totten" trusts may be used to defeat the rights of the surviving spouse. The decisions, including those of New York, have been conflicting on this point. In *Krause v. Krause*[80] the decedent had opened a savings account in his name as trustee for his daughter by a former marriage. His second wife claimed that her expectant interest had been invaded by a transfer meant to cloak a transaction testamentary in character. The court sustained the objections of the widow saying:

> The sole evidence of the aim of the account is the form of the deposit. In these circumstances, we are to draw the inference "that the depositor intended to create a trust but intended to reserve power during his lifetime to deal with the deposit in any way he should choose."[81]

The court apparently felt that the retention of such powers made the trust illusory. The facts of the case did reveal that the decedent had begun a program of reducing his estate for the benefit of his children and to the exclusion of his wife. The daughter lived in Germany until the death of the decedent, hence, it was totally impossible for her to enjoy any of the benefit of the transfer until after the death of the depositor. These facts which made the trust testamentary in nature probably influenced the court to hold that the transfer was merely a mask for the depositor's real purpose, the disinheritance of his second wife.

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[79] *Id.* at 752.

[80] 285 N.Y. 27, 32 N.E.2d 779 (1941).

[81] 285 N.Y. at 33, 32 N.E.2d at 781.

The question again came up for review in New York in the case of *In re Halpern's Estate*.[82] Fifteen months prior to his death the husband created four savings bank accounts in his own name in trust for his infant grandchild. He left a will by which he gave his entire estate to his wife, but he left very little property. The widow attacked the trust accounts as being illusory in that decedent retained full and complete control and exercised full dominion over the accounts at all times. The lower court held that the trusts failed only to the extent to which resort to the deposit was necessary to give the widow her statutory share. The grandchild did not appeal this decision to the court of appeals, hence, it was affirmed. In strong dictum the court did express the opinion that the granddaughter could have appealed successfully since it said the trusts were "valid, effective and not illusory."[83]

After stating that it was regrettable that any husband would resort to such transfers to keep his money from his wife, the court challenged the New York legislature when it said:

> But the Legislature has made no effort to interfere with the impact of the Totten trusts in this connection, nor has the Legislature, despite the test announced in 1937 in *Newman v. Dore*, done anything to save a wife from disinheritance by means of an effective trust erected in a husband's lifetime, for that purpose.[84]

Fourteen years later the New York legislature answered the challenge and amended the statute[85] so that the Totten trust was no longer an effective means of defeating the inheritance of the surviving spouse in New York.

More recently another court has attempted to prod its legislature into enacting additional statutory protection for the surviving spouse. In *Jeruzal v. Jeruzal*[86] the Minnesota court warned that if the legislature further declined to act in the matter, it would adopt the position of the Restatement[87] which allows the surviving spouse to include the value of any tentative trust in computing the share to which such surviving spouse is entitled.

Mississippi has not been faced with the problem of the use of the Totten trust to defeat the rights of the surviving spouse. As the Bar and the bankers become more familiar with such devices, the courts will in due course be confronted with a decision as to whether the rights of the

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[82] 303 N.Y. 33, 100 N.E.2d 120 (1951).

[83] 303 N.Y. at 37, 100 N.E.2d at 122.

[84] 303 N.Y. at 39, 100 N.E.2d at 123.

[85] N.Y. Decedent Estate Law § 18(a) (McKinney Supp. 1967).

[86] 269 Minn. 183, 130 N.W.2d 473 (1964).

[87] Restatement (Second) of Trusts § 58, Comment *e* (1959).

surviving spouse will be protected. Hopefully, the Mississippi court will adopt the policy of the New York legislation and that suggested in Minnesota so that the widow's interest will be protected and the husband will not be permitted to retain effective benefit and control over the property during his lifetime while disinheriting his wife.

E. Gift

The above discussion has related to the more elaborate procedures by which one may disinherit the spouse. Let it be sufficient to say that no such effort is required. A simple gift will accomplish this censurable purpose whether or not there be any retention of benefits. The use of a deed was upheld in *Glass v. Glass*[88] where the husband had deeded non-homestead realty to his two sons by a former marriage. The court held that the fee simple title had vested in the husband alone and he could dispose of the land as he saw fit. It has even been held that there was a completed gift to the exclusion of the wife even though the husband was to retain the gift property.[89]

VI. Conclusion

Several provisions of the Internal Revenue Code make it clear that nothing less than an absolute relinquishment of all the incidents of ownership is necessary in order for property to be excluded from the gross estate for federal estate tax purpose. If a donor transfers property for less than adequate consideration in money or money's worth and retains the income, possession or enjoyment, or the right to name who is to receive the income, possession or enjoyment, the property is taxed to his estate.[91] Likewise, the property is included in the estate of the donor if the donor retains the right to alter, amend, revoke or terminate,[92] or if the transfer is not to take effect until the death of the donor.[93]

Although not so expressly stated, perhaps the policy behind these sections is to prevent a taxpayer from shirking his responsibilities to his government by the use of feigned or pretended transfers while retaining all the incidents of ownership. One may argue that the duty of support to one's widow should receive similar protection. Indeed, the same ar-

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[88] 227 Miss. 470, 86 So.2d 346 (1956).

[89] Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940).

[90] Int. Rev. Code of 1954, §§ 2036-38, 2040, 2042.

[91] Int. Rev. Code of 1954, § 2036.

[92] Int. Rev. Code of 1954, § 2038.

[93] Int. Rev. Code of 1954, §§ 2036-37.

gument may be made as to life insurance owned by the husband with someone other than the wife being named beneficiary,[94] and property which the husband owns jointly with one other than his wife.[95]

It has been said that in the estate tax legislation, "economic realities outweigh legalistic refinements."[96] Some consideration should be given to what are the economic realities between husband and wife today. Although the precise origin of dower is obscure, the institution quickly assumed a function of providing protection for the surviving spouse. After land was no longer the principal source of wealth for the family, dower was less able to afford such protection.[97] Furthermore, it was a hindrance to the ready transfer of land for commercial purposes. These objections and the impending emancipation of women[98] led to the abolition or alteration of common law dower.

Apparently, a feeling exists that the married woman no longer needs the protection she was once given, since she has assumed her place in the world. It is suggested, however, that she is in need of protection for the precise reason that she is now a contributor to the family income. It would seem to be the greatest injustice of all if the wife were to work throughout her married life, spend her earnings on the family, allow the husband to build his personal estate, and then be disinherited by the husband.

That the wife is assuming an important role in the labor force is borne out by recent labor statistics.[99] In March, 1968, the seasonally adjusted total employed civilian labor force in the United States was 75,802,000. Of this number 27,743,000 were women.[100]

Although such statistics are not available, it is reasonable to assume that a substantial portion of these women are married and that each of the married women contributes her income to the support and maintenance of her family. It is suggested that these women need protection similar to that recently enacted in New York[101] so that it will not be necessary for them to accumulate a personal estate to safeguard against disinheritance by their husbands.

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94 INT. REV. CODE of 1954, § 2042.

95 INT. REV. CODE of 1954, § 2040.

96 *Restraints on Disinheritance* 152.

97 T. ATKINSON, WILLS § 30 (2d ed. 1953).

98 *See, e.g.*, MISS CODE ANN. §§ 451-56 (1956).

99 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 91 MONTHLY LABOR REV., May, 1968, at 81.

100 *Id.*

101 N.Y. DECEDENT ESTATE LAW § 18(a) (McKinney Supp. 1967).

STUDENT NOTES

Taxation—Installment Sales: Elections Under Section 453.[1]

X, a cash basis taxpayer, owns Blackacre, which has a present fair market value of $50,000. The basis of Blackacre in X's hands is $20,000. X, having held Blackacre for more than six months, sells it to Y for $50,000, taking a $10,000 down payment and eight promissory notes of $5,000 each, payable over the next succeeding eight years. These notes bear interest at the rate of six per cent per annum.

Query: In his federal income tax return for the year of sale, should X treat the sale as (1) a closed transaction, (2) an open transaction, or (3) an installment sale according to the provisions of § 453 of the Internal Revenue Code of 1954?

Query: If X treats the sale as an open transaction on his tax return for the year of sale and this is disallowed by the Revenue Service, may he then elect to report the sale on the installment method, or will he be required to treat the sale as a closed transaction?

The primary purpose of this paper is to answer the latter query, and the first is included only for purposes of introduction.

The general rule, for income tax purposes, is that gain or loss resulting from a sale is recognized in the year of sale.[2] But when a seller receives only a portion of the sales price at the time of the sale, with the balance to be paid in the future, special tax reporting problems are presented. The seller who receives only a portion of the sales price in the year of sale may be required to report, in the year of sale, the excess of the amount of cash received plus the fair market value of any other property received over his adjusted basis.[3] And under certain, very rare circumstances,[4] the taxpayer may be allowed to treat the sale as an open transaction under which he reports no gain until he has completely recovered his basis.[5] On the other hand, he may, if the requirements are satisfied, report any gain on the sale on the installment method.[6] The installment sales provision presently in effect allows the seller to report as income in each year that proportion of payments received in that year

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[1] This note is limited in scope to sales of real property and casual sales of personal property.

[2] Int. Rev. Code of 1954, §§ 1001-02.

[3] Int. Rev. Code of 1954, § 1001(a) provides that "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis . . ." and § 1001(b) provides that "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."

[4] Rev. Rul. 58-402, 1958-1 Cum. Bull. 15, which states that "the Service will continue to require valuation of contracts and claims to receive indefinite amounts of income . . . except in rare and extraordinary cases."; Treas. Reg. §§ 1.453-6(a)(2), 1.1001.

[5] *Cf.* Burnet v. Logan, 283 U.S. 404 (1931).

[6] *See* Int. Rev. Code of 1954, § 453.

which the gross profit on the sale bears to the total contract price, provided the seller receives no more than thirty per cent of the total contract price in the year of sale.[7] Treatment of a sale on the installment method is permissive and available only if the taxpayer elects to use it.[8]

Assume, for our purposes here, that X, the seller in our problem, is in the fifty per cent income tax bracket and that the fair market value of the promissory notes he received is $35,000. Treating the sale as a closed transaction, X has realized $45,000 in year one.[9] Of this, $25,000 is taxable as long-term capital gain, giving X a tax liability in year one of $6,250.[10] X will then take a basis in the promissory notes of $35,000 and when the notes are paid by Y in years two through nine, X will be taxed on the excess of the amount paid in that year over that note's allocated share of the basis as *ordinary income*.[11] If, on the other hand, X treats the sale as open, he will have no tax liability for years one, two or three because under the open transaction method no gain is reported until the entire basis of the property has been recovered.[12] In addition, the entire payments received in years four through nine, except interest, will be taxed not as ordinary income, but as *capital gains*.[13] The other alternative, reporting the sale under the installment method as provided in § 453 of the Internal Revenue Code of 1954, would give X a tax liability in year one of $1,500 and $750 in years two through nine.[14]

Thus, we can see that the use of the closed transaction treatment will give X a total tax liability on the sale of $8,750. If X reports the sale

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[7] INT. REV. CODE of 1954, § 453(b). It should be noted that "gross profit" and "total contract price" are words of art and have specific definitions relating to installment sales. See Treas. Reg. §§ 453-1(b) and 453-2(c)(2).

[8] *See, e.g.* Sarah Briarly, 29 B.T.A. 256 (1933).

[9] $10,000 cash downpayment plus $35,000 fair market value of the notes. *See* INT. REV. CODE of 1954, § 1001(b).

[10] *See* INT. REV. CODE of 1954, § 1201(b). The remaining $20,000 is, of course, not taxable as it is a return of capital.

[11] In order for the receipt of the notes to be considered a taxable event, they must be treated as "property." The value of these notes is taxable income to the taxpayer and as such becomes the tax cost or basis of the "property." The gain resulting from the debtor paying the notes is not entitled to capital gains treatment because there has been no "sale or exchange." Accordingly, this gain is taxed as ordinary income. *See* Tombari v. Commissioner, 299 F.2d 889 (9th Cir. 1962).

[12] Burnet v. Logan, 283 U.S. 404 (1931).

[13] This is because, under the open transaction treatment, the receipts in the later years are treated as a part of the continuous transaction beginning with the sale. These receipts are a part of the proceeds of a *sale* of a *capital asset* held for *more than six months*, thus qualifying for capital gains treatment. See INT. REV. CODE of 1954, §§ 1221, 1223.

[14] This is computed according to § 453 as follows:

Gross profit = $30,000
Total Contract Price = $50,000
Year 1 – 3/5 of $10,000 = $6,000
$6,000 taxed at 25% = $1,500
Years 2-9 – 3/5 of $5,000 = $3,000
$3,000 taxed at 25% = $750.

as open, he will have a total tax liability of $7,500, just as if the sale were reported on the installment sale method, but under the open method the payment of any tax is deferred for three years, whereas under the installment method some of the tax is payable in year one.

It is apparent from the above that X would prefer to treat the sale as an open transaction. His next choice, under normal circumstances, would be to report it on the installment method. The Commissioner, of course, would rather the transaction be closed, as this method will normally produce more tax revenue.

The Supreme Court said in *Burnet v. Logan*[15] that a sale with such contingency in the value of the property received as to render it impossible to make a reasonably accurate determination of its fair market value warrants open transaction treatment. It is extremely doubtful that the promissory notes in this case would meet the *Burnet v. Logan* test,[16] so X would be wise to forego the slim possibility of tax savings and report the sale on the installment method.

We now turn to the second question related to our problem fact situation: If X has reported the sale on the open transaction basis and the Commissioner determines that this treatment is not available, may X then elect to take advantage of the installment sales provisions of the Code, or will he be required to treat the transaction as closed in the year of sale?

Prior to the promulgation of the current installment sales regulations, there was considerable litigation over the question of forfeiture of the right to report gain on the installment sale method.[17] In these cases the Commissioner consistently took the position that in order to take advantage of the installment sale provisions, the taxpayer had to choose to do so in a timely filed tax return or forfeit the right, even though neither the statute nor the applicable regulations so required.[18]

In *Sarah Briarly*[19] the taxpayer sold real estate in 1928, realizing income therefrom. She failed to file an income tax return for the year of sale and the collector prepared a return for her, treating the entire profit on the sale as income in 1928. The taxpayer contended that the sale qualified as an installment sale and that she was then entitled to report the gain on the installment method. The Commissioner argued that the sale was not an installment sale, but even if it were, the taxpayer had forfeited her right to report under the installment method by failing to report in a timely filed return. The court sustained the Commissioner saying:

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[15] 283 U.S. 404 (1931).

[16] The value might be sufficiently uncertain if the debtor is insolvent or if some other fact makes the collection of the notes doubtful.

[17] *Compare* Jacobs v. Commissioner, 224 F.2d 412 (9th Cir. 1955) *with* United States v. Eversman, 133 F.2d 261 (6th Cir. 1943) *and* Scales v. Commissioner, 211 F.2d 133 (6th Cir. 1954).

[18] *See e.g.* Sarah Briarly, 29 B.T.A. 256 (1933); Liberty Realty Corp., 26 B.T.A. 1119 (1932). Rev. Rul. 93, 1953-1 CUM. BULL. 82 states, "An election to report a sale of property on the installment basis . . . must be exercised *in a timely filed Federal income tax return for the taxable year in which such sale was made,* otherwise the right of such an election is forfeited." (emphasis added).

[19] 29 B.T.A. 256 (1933).

> These [installment sale] provisions bestowed a benefit on taxpayers that had not theretofore had statutory approval. Where benefits are sought by the taxpayers, meticulous compliance with all named conditions is required. . . . This, in our opinion, requires both *timely and affirmative action* on the part of those seeking to take advantage of the benefits conferred by the statute. . . . To allow a choice where the taxpayer sits supinely by until by the diligence of the Government it is discovered that a tax is due would put a premium on inertia that certainly is not within the spirit of our system of taxation. (emphasis added).[20]

In *Liberty Realty Corp.*[21] the taxpayer sold at a profit in 1928 certain real estate holdings. In the taxpayer's income tax return for 1928, the sales were reported on the accrual basis, the taxpayer being ignorant of the provisions permitting return on the installment basis. In 1930 the taxpayer filed an amended return, reporting the income from these sales on the installment basis. The Commissioner refused to accept the amended return and determined a deficiency for 1928, treating the transactions as closed. The court held for the Commissioner, saying that the legislative history of the installment sale provision indicates that a taxpayer is required to make an election as to the use of the installment method in an original return. The court said:

> The [taxpayer] having elected on its original return to use the accrual basis of reporting its income, and there being nothing in the record to show that its income would be more clearly or correctly reflected upon the installment sales basis, we hold that its tax liability for 1928 has been properly computed upon the accrual basis.[22]

The Supreme Court, in *Pacific National Co. v. Welch*,[23] gave some port to the Commissioner's contention that the right to report on the installment method is waived by failure to elect to do so on a timely filed return. In that case the taxpayer reported sales of real property as closed transactions in 1928. In 1931, the taxpayer filed a refund claim on the ground that the sales had been on the installment basis. The Commissioner rejected the claim. In holding for the Commissioner, the Court said that to allow the taxpayer now to utilize the installment method would operate to enlarge the statutory period for filing returns to include the period allowed for recovering overpayments. The Court went on to say that:

> There is nothing to suggest that Congress intended to permit a taxpayer, after expiration of the time within which return is to be made, to have his tax liability computed and settled according to the other method. By reporting income from the sales in

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[20] *Id.* at 258-59.

[21] 26 B.T.A. 1119 (1932).

[22] *Id.* at 1120.

[23] 304 U.S. 191 (1938).

> question according to the deferred payment method, [the taxpayer] made an election that is binding upon it and the commissioner.[24]

To the opposite effect, however, is *C'de Baca v. Commissioner*.[25] decided by the Fifth Circuit. In *C'de Baca* the taxpayer sold her farm in 1953 under conditions qualifying the sale for installment treatment. She failed to file income tax returns for the years 1953-55. On March 26, 1957, she filed her income tax return for 1953 and the intervening years in which she attempted to elect to use the installment method. The Tax Court upheld the Commissioner's contention that the return filed in 1957 was not timely and that the taxpayer had forfeited her right to report the profits on the sale on the installment basis.[26] The Court of Appeals for the Fifth Circuit reversed, stressing the fact that neither the statute nor the regulations required that the election to use the installment method be made in a timely filed return. The court went on to say: "We think that the penalty provisions for negligence and for failure to make a timely estimate completely exhaust the power in the Commissioner or the courts to penalize for these omissions. The law does not lightly impose penalties and courts look with disfavor on forfeitures."[27]

The above cases exemplify the two divergent approaches taken by the courts respecting the necessity of a timely election to use the installment method. The approach of the court in *Sarah Briarly* and *Liberty Realty Corp.* was that the installment sales provision was a specific Congressional exception to the general rule of reporting income, and as such should be strictly interpreted against the taxpayer.[28] The rationale of *C'de Baca,* on the other hand, was that Congress, having already provided for penalties in case of failure to report income correctly, did not intend that there be an additional penalty in the form of denial of the right to use the installment method.[29]

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[24] *Id.* at 194.

[25] 326 F.2d 189 (5th Cir. 1964).

[26] Marion C'de Baca, 38 T.C. 609 (1962).

[27] 326 F.2d at 191.

[28] *See* notes 19 and 21. This theory of strict interpretation against the taxpayer has been adhered to where the entire gain was reported in the year of the sale (Sylvia S. Strauss, 33 B.T.A. 855 (1935)), where the taxpayer failed to report any gain in the year of sale (Johnson Realty Trust, 21 B.T.A. 1333 (1931)), where no return was filed in the year of sale (Cedar Valley Distillery, Inc., 16 T.C. 870 (1951)), and where the sale was not reported because of the taxpayer's belief that no tax was due until his basis was recovered (W.A. Ireland, 32 T.C. 994 (1959); John W. Commons, 20 T. C. 900 (1953)).

[29] *See* note 27. This theory has been used to allow the taxpayer to adopt the installment method where the sale was reported as a lease (Scales v. Coommissioner, 211 F.2d 133 (6th Cir. 1954)), where the sale was not mentioned in an original return (Jack Farber, 36 T.C. 1142 (1961)), where the failure to report a gain was based on the belief that no taxable event had occurred (John F. Bayley, 35 T.C. 288 (1960); Nathan C. Spivey, 40 T.C. 1051 (1963)), and where no return was filed because of a belief that the taxpayer was exempt (F. E. McGillick Co., 42 T. C. 1059 (1964)).

In 1958 the Treasury Department issued a new and more detailed set of regulations governing the adoption of the installment method of reporting income.[30] These new regulations still did not seem to require clearly and explicitly that the taxpayer make an absolute choice on an original return to take advantage of § 453.[31] The language of Treas. Reg. § 1.453-8(b) (1) may be interpreted to require only that there must be a disclosure, on a timely filed return, of the facts of the transaction.[32] Even so, the Commissioner remained steadfast in requiring an election of the installment method on a timely filed original return.

The Court of Appeals for the Tenth Circuit, in upholding the constitutionality of Treas. Reg. § 1.453-8(b)(1), gave some support to the Commissioner's contention that the election must be made on a timely filed original return.[33] In that case the taxpayer had sold real property in 1958 on a deferred payment plan, the first payment not being due until 1959. She made no mention of the sale in her tax return for 1958, but her 1959 income tax return showed the 1959 installment as long-term capital gain taxable in 1959. The Commissioner determined, relying on the general rule that gain from a sale is income for the year of sale, that the gain was taxable in its entirety in 1958 and accordingly asserted a deficiency for that year. The court held that the taxpayer's failure to report, or even mention, the transaction in the year of sale foreclosed a later election to report on the installment method.[34]

However, other courts have refused to accept the Commissioner's interpretation of the Regulations under § 453. In *Mamula v. Commissioner*[35] the taxpayer chose to treat certain sales of real estate on installment plans as open and report the gain therefrom on a deferred basis, reflecting no income in the year of sale. A subsequent audit of the taxpayer's return resulted in a determination by the Commissioner that the deferred basis method was improper under Treas. Reg. § 1.453-6 because the promissory notes received from the purchaser had an ascertainable fair market value. The taxpayer then requested that he be permitted to report the gain from the sales on the installment method. The Commissioner refused, assessing a deficiency against the taxpayer by including the entire profit as income in the year of sale. The Tax

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[30] Even though the new Code was effective as of 1954, no new regulations pertinent to installment sales were adopted until September 17, 1958. However, § 7807 of the 1954 Code kept in force the regulations promulgated under the similar section of the 1939 Code until regulations under the 1954 Code could be adopted.

[31] Treas. Reg. § 1.453-8(b)(1) provides:

> A taxpayer who sells or otherwise disposes of real property, or who makes a casual sale or other casual disposition of personal property, and who elects to report the income therefrom on the installment method must set forth in his income tax return (or in a statement attached thereto) for the year of the sale or other disposition the computation of the gross profit on the sale or other disposition under the installment method.

[32] *See* Mamula v. Commissioner, 346 F.2d 1016, 1019-20 (9th Cir. 1965).

[33] Ackerman v. United States, 318 F.2d 402 (10th Cir. 1963).

[34] It should be noted that the court in *Ackerman* followed the strict interpretation theory as applied in *Sarah Briarly* and *Liberty Realty*.

[35] 346 F.2d 1016 (9th Cir. 1965).

Court upheld the Commissioner's refusal to permit the taxpayer to use the installment method.[36] The Tax Court supported its decision by the precedent established in *Pacific National Co. v. Welch*[37] and a series of Tax Court decisions. As an alternative basis for upholding the denial of the request, the Tax Court noted the taxpayer's failure to comply with the regulations promulgated under § 453. The circuit court reversed, holding that *Pacific Nat'l* was not controlling because the taxpayer could not ing that *Pacific National* was not controlling because the taxpayer could not be bound by his choice for it was not an allowable choice.[38] The court fact that the administrative burden sought to be prevented in *Pacific National* would not be avoided by requiring the use of the closed transaction basis. The court also found the Tax Court's alternative basis to be unwarranted. It said:

> The Regulations can only be reasonably construed as applicable where the taxpayer does elect the installment method in the year of sale; if he so elects, the Regulations set out the nature of the schedules that must be attached to that year's income tax return. In light of the unique retroactive election of the installment method sought to be used in this case where there has been good faith and a full disclosure of the transactions in the year of sale, it seems inequitable and unfair that the Regulations should be applied literally, contrary to the purpose and in conflict with the intent originally expressed by the Congress in passing the remedial statute.[39]

As a result of the many decisions against the strict interpretation of the Regulations adopted by the Service,[40] the Commissioner issued in 1956 an advance ruling pending the amendment of the Regulations.[41] This ruling was in essence that the Service would accept a late election of the installment method if (1) the sale took place in a taxable year ending before December 18, 1958, provided the election to use the installment method was made in the return for the year in which the first payment was received, or (2) where the year of sale has not been closed by the statute of limitations or any other law or rule of law, if

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[36] Peter Mamula, 41 T.C. 572 (1964).

[37] *See* note 23 and accompanying text.

[38] 346 F.2d at 1018. It should be noted that *Pacific Nat'l* involved an attempted shift from a closed transaction treatment to the installment method, and closed treatment was available as an original choice.

[39] 346 F.2d at 1019-20.

[40] *See, e.g.*, Mamula v. Commissioner, 346 F.2d 1016 (9th Cir. 1965); Glidden Co. v. United States, 241 F. Supp. 195 (N.D. Ohio 1964), (transfer reported in a timely return as a lease); John P. Reaver, 42 T.C. 72 (1964), (installment payments included in gross receipts from taxpayer's business); Bookwalter v. Mayer, 345 F.2d 476 (8th Cir. 1965), (sale not reported on original return but election made on amended return). *See also* Robert L. Griffin, T. C. Memo 1965-91 (1965) *and* Jolley v. United States, 246 F. Supp. 533 Nev. 1965).

[41] Rev. Rul. 65-297, 1965-2 CUM. BULL. 152.

there was no election made in the year of sale inconsistent with the installment method, or (3) where the election is made on a delinquent return for the year of sale.

Returning now to our problem, it is obvious that X cannot subsequently elect the installment method under condition (1) of Rev. Rul. 65-297 because the transaction took place after December 18, 1958. We shall also eliminate condition (3) as a possibility for allowing X to elect the installment method upon an amended return, as we shall assume that he has filed an original return for the year of sale in which he disclosed the facts of the sale but reported no income therefrom, treating the transaction as open. Therefore, only condition (2) remains as a possible means by which X may be allowed to elect the installment method on an amended return. And whether this is available or not depends upon whether the treatment of the sale on the original return as open amounts to an "election inconsistent with the installment election." It is difficult to see how it may be said that the open transaction treatment is not inconsistent with the installment method. Treatment of a sale as open is obviously in conflict with the installment election because it is clear evidence of the taxpayer's desire to have the sale taxed according to open transaction treatment rather than according to the installment sale provisions.[42]

Thus, it appears that the Commissioner, following Rev. Rul. 65-297, would certainly contest X's treatment of the sale as open, and would refuse to allow X to subsequently elect the installment method of reporting.

Rev. Rul. 65-297 does not seem to solve satisfactorily the problem presented when a taxpayer attempts to elect the installment method after the Commissioner has disallowed his treatment of a sale as open. This ruling in effect does away with the open transaction method of reporting, except in the clear *Burnet v. Logan* type of situation, because of the great risk involved. A taxpayer who feels that his sale validly may be entitled to open treatment is not likely to report the transaction as open if, upon disallowal of this treatment by the Commissioner, the only alternative is to close the transaction in the year of sale. He would be more likely to discount the possible tax savings resulting from open treatment in relation to the possibility of being required to treat the sale as closed and instead of subjecting himself to the risk involved in reporting the transaction as open, report it on the installment method in the first instance.

It appears that a better rule in this type of case would be that suggested by the language of *Mamula;* that is, the good faith of the taxpayer in originally reporting the sale as open. If the taxpayer is found to have entertained in good faith an honest and credible belief that the facts of the sale qualify it for open treatment, but the availability of open treatment is denied by the Commissioner, he would then be allowed subsequently to elect the installment method.

However, good faith as a sole test does not appear to be the best, nor even a satisfactory solution. The end effect of a "pure" good faith test more probably than not would be an increase rather than a decrease

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[42] *See, e.g.,* George E. Freitas, T.C. Memo 1966-105 (1966).

in the amount of litigation in this situation because a taxpayer could in almost any factual circumstance bring forth at least some justification for his entertaining a "good faith" belief that he is entitled to treat the sale as open.

The best solution to the problem would seem to be a good faith test modified by certain presumptions. This proposed solution would require that the taxpayer attach a schedule to his tax return for the year in which the first payment is received showing the computation of the gross profit on the sale, fully disclosing all the facts of the transaction and, if the taxpayer wishes to use open transaction treatment, explaining why he feels that he is entitled to do so. This should effectively restrain taxpayers from reporting on the open basis in the hope that their erroneous treatment will not be discovered, because the attached schedule would call to the Commissioner's attention the fact that open treatment has been utilized in computing the taxpayer's tax liability, and also give to the Commissioner the information necessary for a determination of whether open treatment is proper. In addition, certain presumptions would aid, and make more consistant, the determinations as to whether the taxpayer had acted in good faith in his original choice of open treatment. The proposal is that in the case where the seller receives negotiable instruments or any other type of tangible property a presumption of bad faith is raised if he reports the sale as open. On the other hand, reporting the transaction as open when a mere contract right is received by the seller is presumed to have been in good faith. Of course each of these presumptions is a presumption of fact and is subject to rebuttal by adequate proof to the contrary.

Anson Bob Chunn

Commercial Law—Disclaimer of Warranties Under the Uniform Commercial Code

Introduction

When the Uniform Commercial Code became effective in Mississippi on March 31, 1968, § 2-316, on disclaimer of warranties by sellers, was conspicuously missing. The explanation for this omission was that some people, "felt that a manufacturer should not place his product in the stream of commerce and then be allowed to disclaim all liability. . . ."[1]

Apparently, the fear is that a manufacturer will place some defective article on the market with some sort of disclaimer of warranties clause attached to it and thereby be allowed to assert the disclaimer as a defense to any suit by an injured consumer. Assuming arguendo that § 2-316 would allow a manufacturer to do this, the injured party would still have a remedy under the doctrine of products liability. Under this theory, if an injured plaintiff can prove to the satisfaction of a jury that the product which injured him was defective when it left the defendant's

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[1] Witherspoon, *Torts or Warranties?*, 39 Miss. L.J. 199, 210 (1968).

plant, "the inferences are usually drawn in his favor on the theoretical issue of negligence, with or without an assistant from the doctrine of *res ipsa loquitor* or that of negligence per se."[2]

The Mississippi Supreme Court adopted the theory of strict liability in tort in *State Stove Manufacturing Co. v. Hodges*.[3] In doing so the court stated:

> If the article left the defendant's control in a dangerously unsafe condition, or was not reasonably safe, or was unsafe for its intended use, the defendant is liable whether or not he was at fault in creating that condition, or in failing to discover and eliminate it."[4]

The court in discussing the theories of liability upon which a manufacturer could be held responsible to an injured consumer said:

> The idea of a warranty introduces quite unnecessary complications into the liability of a manufacturer to a consumer . . . . [T]he liability is in tort and not in contract, and a concept of warranty from the contract law of sales is irrelevant.[5]

The purpose of this note is to discover generally whatever disclaimer law existed in Mississippi prior to the enactment of the Uniform Commercial Code, what changes, if any, were effected by adopting the Code without § 2-316, and what would be the possible results of adding that section to the Mississippi Uniform Commercial Code.

Mississippi Law on Disclaimer

The only statutory treatment of disclaimer that could be found prohibits a seller of agricultural seeds from disclaiming warranties required by law.[6]

As early as 1846, the Mississippi Supreme Court recognized that certain knowledge on the part of the buyer at the time of the sale would void any warranties inconsistent with that knowledge.[7] Also, where a contract states that it is the entire contract, "without any express or implied warranties unless expressly contained herein," any other expressed or implied warranties are inoperative.[8] In another case, the contract for sale contained a clause which stated, "that there is no agreement or promise relating to this contract or transaction not embodied herein." This was held to be a disclaimer by the seller of any implied warranties of the article's suitability for its intended purpose.[9] No warranties extend to open and visible defects even if they are inconsistent

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[2] *Id.* at 199-200.

[3] 189 So.2d 113 (Miss. 1966), *cert denied*, 386 U.S. 912 (1967).

[4] 189 So.2d at 121.

[5] *Id.* at 119.

[6] Miss. Code Ann. § 4397-07 (Supp. 1964).

[7] Hutcheson v. Minis, 15 Miss. (7 S & M) 388 (1846).

[8] Industrial Fin. Corp. v. Wheat, 142 Miss. 536, 107 So. 382 (1926).

[9] J.T. Fargason and Son v. Cullander Mach. Co., 224 Miss. 620, 80 So.2d 757 (1955).

with the warranty.[10] Insofar as latent defects are concerned, where the buyer has the opportunity to inspect the thing to be purchased and the seller has no knowledge that it is defective, there is no implied warranty even though a latent defect is later discovered.[11] Where implied warranties are specifically disclaimed in the contract and express warranties are made regarding the article to be sold, no warranties will be implied by the court.[12] In a recent Fifth Circuit case[13] the Mississippi law on disclaimer was described as follows:

> Mississippi recognizes the validity of a non-warranty clause . . . . However, the disclaimer must clearly and unequivocally describe the warranties it disclaims, and uncertainties in the language used must be resolved against the disclaimer.[14]

Effect of Excluding Section 2-316

The exclusion of § 2-316 from the Uniform Commercial Code as adopted in Mississippi would seem to leave the prior law in force. There has been speculation that the fact that the legislature refused to adopt § 2-316 is a refusal to allow any disclaimer. As indicated at the beginning of this note, the purported reason for the exclusion of this section would not seem to bear this out.[15] Even if the exclusion did indicate an intention on the part of the legislature to disallow disclaimer, the Court might not agree. It would seem to require something more than mere failure of the legislature to act for the court to find that over a hundred years of case law had been overruled by the legislature.

The Purpose and Meaning of Section 2-316

As one eminent authority, Mr. William E. Hogan,[16] has pointed out, because "the section [2-316] should be restored to [Mississippi] law and because Mississippi lawyers will be forced to meet the requirements in other jurisdictions. . .," the omitted section demands treatment.[17] Likewise, the omitted section demands treatment here. In the case of express warranties, § 2-316 (1) provides:

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[10] Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So.2d 558 (1962).

[11] McElroy v. Long, 170 F.2d 345 (5th Cir. 1948).

[12] Stribling Bros. Mach. Co. v. Girod Co., 239 Miss. 488, 124 So.2d 289 (1960).

[13] Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962).

[14] *Id.* at 300.

[15] Witherspoon, *Torts or Warranties?*, 39 Miss. L.J. 199, 210 (1968).

[16] Professor of Law, School of Law, Cornell University. A.B. and LL.B., Boston College, J.S.D., 1963, Harvard, Co-author, "Cases and Materials on Creditors' Rights and Secured Transactions under the U.C.C."; U.C.C. Annotations for Massachusetts, New Hampshire, and New York; New York Supplement to Banks and the U.C.C. Served as Vice-Chairman of A.B.A. Committee on the U.C.C., and as consultant for Massachusetts Legislative Commission on the U.C.C., New York Commission on Uniform State Law, and New York Law Revision Commission.

[17] Hogan, "The Highways and Some of the Byways in the Sale and Bulk Sales Articles of the Uniform Commercial Code," in *Proceedings of the 1967 Twenty-Second Annual Mississippi Law Institute on Uniform Commercial Code* 48 (1967).

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

It appears from this section that express warranties will be held operative whenever possible. Therefore, any disclaimer which is not consistent with an express warranty would be inoperative.[18]

The courts then must attempt a reconciliation of any express warranty with any disclaimer. Where the two cannot be "reasonably" reconciled, the disclaimer must give way to the express warranty.[19]

The disclaimer of an implied warranty is governed by § 2-316 (2). That sub-section provides:

> Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

From this subsection, it readily can be seen that any disclaimer of the implied warranty of merchantability must mention specifically the word merchantability, and when written, it must be conspicuous.[20] To exclude any implied warranty of fitness, the disclaimer does not have to mention specifically the word fitness,[21] but the disclaimer does have to be in writing and must be conspicuous. The last sentence in subsection (2) sets forth recommended exclusionary language. To determine whether a disclaimer of fitness meets the requirements of the Code, the courts will have to compare the words used in the contract with the exemplary language of subsection (2).[22] The combined effect of subsections (1) and (2) is to increase consumer protection by requiring merchantability to be mentioned and disclaimers of fitness to be in writing and conspicuous.[23]

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[18] 4 R. Henson and W. Davenport, Uniform Laws Annotated 104 (1st ed., 1968).

[19] Cudahy, *Limitations of Warranty under the Uniform Commercial Code*, 47 Marq. L. Rev. 127, 131 (1963) [hereinafter cited as Cudahy].

[20] Conspicuous is defined in § 1-201 (10) of the Uniform Commercial Code thusly: " 'Conspicuous'; A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous."

[21] This refers to any implied warranty of fitness for a particular purpose under § 2-315 of the Code. Cudahy at 137.

[22] Cudahy at 138.

[23] *Id.*

Paragraphs (a), (b), and (c) of subsection (3) are examples of common factual situations in which the surrounding circumstances of the transaction are such that the buyer's attention should be called to the fact that no warranties are being made and implied warranties are being excluded.[24] The provisions are:

> (3) Notwithstanding subsection (2)
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> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

The exclusionary language such as "as is," "with all faults" or any other language which in ordinary commercial usage would let the buyer know that he must bear the risk as to the quality of the goods is recommended for use where disclaimers are used.[25] Also, where the buyer examines the goods or should have examined the goods, there are no implied warranties as to any defects the examination[26] uncovered or should have uncovered. If the seller makes the goods available and demands that the buyer examine them, the limitations of the phrase, "has refused to examine," are made operative. This means that under these circumstances, the buyer should have the risk of defects which the examination demanded would have revealed to him.[27] Also, the particular buyer's skill is to be considered in determining the extent of risk assumed upon examination of the goods.[28] A professional buyer will be deemed to have assumed a greater risk than a non-professional buyer because it is assumed that he will detect all defects that any

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[24] UNIFORM COMMERCIAL CODE § 2-316, Comment 6.

[25] Freedman, *Product Liability under the Uniform Commercial Code*, 10 PRAC. LAW. 57 (1964).

[26] UNIFORM COMMERCIAL CODE § 2-316, Comment 8 explains the term examination as follows: " 'Examination' as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract."

[27] HAWKLAND, SALES AND BULK SALES 49-50 (1958).

[28] UNIFORM COMMERCIAL CODE § 2-316, Comment 8.

professional in his field would.[29] The non-professional buyer, on the other hand, is held to have assumed those risks that a layman would have detected.[30]

The key to § 2-316 (3) (c) would seem to lie in the definition of such terms as "course of dealing," "course of performance," and "usage of trade." These terms are defined in §§ 1-205 and 2-208. According to these sections, the entire surrounding circumstances could be considered in determining the extent of any disclaimer.

Conclusion

The inclusion of § 2-316 into the Mississippi Uniform Commercial Code would not allow a manufacturer to place a defective product on the market and disclaim all liability to injured consumers. The available and possibly best remedy for an injured consumer is in tort. He can either proceed under the theory of products liability or strict liability.

The failure of the legislature to adopt § 2-316 along with the rest of the provisions has left the old law in effect. The law as it now stands on disclaimer is more general and unclear than under § 2-316. Under present law sellers cannot be certain of what is required in order for their disclaimers to be effective, while under § 2-316 the requirements and limitations are more definitely defined, thus lending more certainty to commercial dealings. Also, under present law, a buyer cannot be certain that he has been made aware of all the risks he must bear in regard to the purchase of goods, whereas, under § 2-316 he would be more able to determine those risks and obligations.

Without § 2-316, the Code is out of balance, so to speak. There are other sections of the Code, §§ 2-312 to 2-315, which deal with the various warranties regarding their inclusion in a contract. Section 2-316 is intended to specify the procedure whereby an exclusion of a warranty can be effectuated. The determination of whether a warranty should be excluded should be left to the contracting parties. The law governing the inclusion or exclusion of warranties should be designed to insure fair dealing and full disclosure of intentions by each party to the contract. It is submitted that the Code insures the fuller realization of this purpose only with the inclusion of § 2-316.

Joseph L. McCoy

Criminal Law—The Power of the Attorney General of Mississippi to Institute and Conduct Prosecutions

In 1932, the Institute for Government Research of the Brookings Institution observed:

> We have been jealous of the powers of the trial judge, but careless of the continual growth of power in the . . . [district attorney]. His office is the pivot on which the administration of

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[29] *Id*

[30] *Id.*

> criminal justice in the States turns. . . .[1] Being elective officers, usually for relatively short terms, they are likely to be deep in politics[2] . . . [and strongly affected by] . . . local biases and favors. . . .[3]

What becomes of the administration of criminal justice when a case arouses such strong local sympathies that a district attorney, because of political, social and perhaps economic pressures, fails to institute criminal proceedings? Must the criminal laws of the State go unenforced? Is there an officer of the State of Mississippi, other than the district attorney, who may legally act on his own initiative in the State's behalf? [4] The policies, constitutional provisions, cases, and statutes of the State of Mississippi indicate an affirmative answer to this final question.[5] First, that effective administration of criminal justice is indispensable for any governmental unit is readily apparent. To declare that only a district attorney may institute criminal proceedings within his judicial district is to assert the appalling notion that this crucial state function depends entirely upon one official. In a state government characterized by a very high degree of decentralization, the vesting of such exclusive power in one individual seems highly incongruent. On the other hand, claiming that another official possesses power concurrent with that of the district attorney merely embodies the "traditional policy of giving two public officials [similar] powers in the hope that if one does not perform the other one will."[6] Where the enforcement of criminal laws is concerned, such an arrangement is indispensable. Thus the question becomes: In what other State office does concurrent power to prosecute reside?

Since the Attorney General is the only official elected by a state-wide constituency with broad *ex officio* powers as an advocate for the

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[1] THE INSTITUTE FOR GOVERNMENT RESEARCH OF THE BROOKINGS INSTITUTION, REPORT ON A SURVEY OF THE ORGANIZATION AND ADMINISTRATION OF STATE AND COUNTY GOVERNMENT IN MISSISSIPPI 470 (1932).

[2] *Id.* at 469.

[3] *Id.* at 471.

[4] The county attorney may conduct *some* prosecutions on his own, but the office of county attorney is not one of state-wide incidence, and the county attorney, when acting on his own initiative, may only proceed before justice of the peace and county courts. Although justice of the peace courts are found in each county, few counties have the county court. Both of these courts possess only limited criminal jurisdiction. *See* MISS. CODE ANN., §§ 3910 *et seq.*, §§ 1604 *et seq.*, §§ 1803 *et seq.* (1956) and MISS. CONST. § 171.

[5] Statutory law provides for special prosecutors in some cases. Section 3924, MISS. CODE ANN. (1956), provides for a court-appointed prosecutor when "the district attorney shall be *absent or unable* to perform his duties or be disqualified. . . ." (emphasis added). However, there is no statutory authority for a court-appointed prosecutor when the district attorney for some reason, is *unwilling* to perform his duties.

[6] DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecutions*, 25 J. CRIM. L.C. & P.S. 358, 385-86 (1934-35).

State, it is logical to scrutinize his powers first in order to determine which official might enforce criminal sanctions when a district attorney fails to.[7]

The Mississippi Constitution of 1890 declares merely that "there shall be an attorney-general, elected. . . ."[8] It does not enumerate the powers and duties attached to the office; also, unlike the section pertaining to district attorneys,[9] it does not specify that the duties of the office shall be prescribed by law.[10] Therefore, in order to determine the powers vested in the office by the Constitution, it is necessary to rely on the interpretation of § 173, which provides for the election of an attorney general. Various statutes can be of assistance only to the extent that they declare legislative policy or confer *additional* duties and powers upon the Attorney General since "powers of the attorney general . . . conferred upon the office by the constitutional . . . must remain inviolable as long as the constitutional grant continues,"[11] and ". . . neither the legislature nor the courts can deprive the attorney general of the authority which the state constitution has granted him."[12]

In 1944, the Mississippi Supreme Court said that the duties of the Attorney General were not prescribed by the Constitution because they existed at common law, and "the creation of the office of Attorney-General by the Constitution vested him with these common law duties, which he had previously exercised as *chief law officer of the realm.*"

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[7] "Many other states recognize the . . . [power of the Attorney General] . . . to conduct criminal prosecutions. State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369; . . . Respass v. Commonwealth, 131 Ky. 807, 115 S.W. 1131, 21 L.R.A. (N.S.) 836; State v. Moore, 46 Nev. 65, 207 P. 75, 22 A.L.R. 1101; State v. S.H. Kress & Co., 115 Fla. 189, 155 So. 823; . . . 2 R.C.L. pp. 916, 917, § 5." Commonwealth v. Margiotti, 188 A. 524, 528 (1936).

[8] Miss. Const. § 173.

[9] Miss. Const. § 174.

[10] Miss. Const. § 173. The first Mississippi Constitution did not specify how the powers and duties of the Attorney General would be set. Miss. Const. Art. V, § 14 (1817). And the next constitution was similar in this respect. Miss. Const. Art. IV, § 25 (1832). However, the 1867 Constitution specified that the powers and duties of the Attorney General *and* the district attorney would be set by law. Miss. Const. Art. VI, § 25 (1867). The statutes enacted to implement that section granted only limited powers to the Attorney General. *See* Miss. Code of 1880 §§ 251-255. (The Constitution of 1867 and many statutes thereunder were adopted under Reconstruction Era administrations, but the Constitution of 1890, currently in effect, was adopted after that period.) The 1890 Constitution doubtlessly changed this 1867 section to the existing form "with the view that [the Attorney General] should have and exercise all the powers of that officer at common law . . ." G. H. Ethridge, Mississippi Constitutions 320 (1928).

[11] 7 Am. Jur. 2d *Attorney General* § 7 (1963).

[12] *Id.*

(emphasis added).[13] In an earlier case, the court had elaborated, using this widely cited language:

> 'At common law the duties of the Attorney General, as chief law officer of the realm, were very numerous and varied. He was the chief legal adviser of the crown, and he was entrusted with the management of all legal affairs, and prosecution of all suits, *civil and criminal*, in which the crown was interested.' [H]e could intervene in all actions which were of concern to the general public, including the right to *institute, conduct, and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order and protection of the public rights*. 2 R. C. L. §§ 4 and 5, pp. 915-917. (emphasis added).[14]

Blackstone referred to criminal suits instituted by the attorney general as one of the two methods of enforcing criminal laws in his time.[15] Another expert on English law states that it was the attorney general who "conduct[ed] important state trials, not only in court, but also in their preliminary stages."[16] The implication should not be drawn from this that the current Attorney General with common law powers is limited to prosecution of "important" trials; he "may conduct such criminal prosecutions as he may see fit . . ,[17] and he ". . . is endowed with a large discretion over matters of public concern. . . ."[18]

The district attorney lacks common law power;[19] his powers and duties must be established by law.[20] The chief duty of the district attorney is to "prosecute . . . all criminal prosecutions and all civil cases in which the state or any county within his district may be in-

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[13] Kennington-Saenger Theaters, Inc., v. State, 196 Miss. 841, 865-66, 18 So.2d 483, 486 (1944), *citing* Capitol Stages, Inc. v. State, 157 Miss. 576, 128 So. 759 (1930). Historically, the court first referred to common law powers via dictum in State v. Key, 93 Miss. 115, 46 So. 75 (1908). Later it held that they were nonexistent. Board of Supervisors v. Guaranty Loan, Trust, and Banking Co., 117 Miss. 132, 77 So. 955 (1918). Then the legislature conferred common law powers on the Attorney General, but the court implied that this was unnecessary in *Capitol Stages, Inc. v. State, supra*. More recent cases have not questioned the proposition that the Attorney General possesses common law powers. *See, e.g.*, cases cited in note 24 *infra*.

[14] Capitol Stages, Inc. v. State, 157 Miss. 576, 591, 128 So. 759, 763 (1930). This language is widely cited in subsequent Mississippi cases as well as in other jurisdictions.

[15] 4 BLACKSTONE, COMMENTARIES *308.

[16] 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW 462. Holdsworth implies that the attorney general only conducted important trials because of the extent of his duties. He apparently allowed his subordinates to conduct most trials and appeared personally only when he considered the matter important enough to justify his direct attention. The decision as to importance was his alone to make.

[17] 7 AM. JUR. 2d *Attorney General* § 23 (1963).

[18] 7 C.J.S. *Attorney General* § 5 (1937).

[19] Capitol Stages, Inc. v. State, 157 Miss. 576, 591-92, 128 So. 759, 763 (1930).

[20] MISS. CONST. § 174.

terested. . . ."[21] This provision does not stipulate that the district attorney's power shall be exclusive, nor has it been interpreted in such a manner. Even if such a stipulation were present, it seems that it could only be construed as a void statutory attempt to restrict a constitutional provision.[22] Although the district attorney may generally represent the State and counties of his district in civil matters, his power is held to be limited to action on matters of local concern as opposed to those of state-wide concern where the Attorney General has exclusive power.[23] However, the converse is not true; in matters of local concern, no holding has been found which grants the district attorney exclusive power to act, and presumably, such a holding could not properly stand together with the present long-standing interpretation of the Attorney General's constitutional powers.[24]

Regardless of the extent of the district attorney's power in civil matters of local concern, classification of criminal prosecutions as matters of local concern would be dubious at best. Criminal prosecutions, even at the trial and pre-trial stages, have both local and state-wide aspects. Venue provisions suggest that criminal law violations are of local concern.[25] The geographical nature of the district attorney's powers also imply local concern.[26] However, the law violated is State law; the only trial expense not always borne by the State is that of providing counsel for the defendant; State law enforcement officers often assist; and "all prosecutions [are] carried on in the name and by authority of the 'State of Mississippi' and all indictments [must] conclude 'against the peace and dignity of the state.'"[27] Also, when some finality in a criminal

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[21] MISS. CODE ANN. § 3920 (1956).

[22] "[A] constitutional provision authorizing the legislature to prescribe the duties of the prosecuting attorney does not authorize the legislature to confer on this officer such powers as would enable him to usurp the common law duties and functions of the attorney general." 27 C.J.S. *District & Pros. Attys.* § 12(3) (6) (1959). *See also* text corresponding to notes 11 and 12 *supra*.

[23] Capitol Stages, Inc. v. State, 157 Miss. 576, 593, 128 So. 759, 764 (1930).

[24] 157 Miss. at 591, 128 So. at 763. "Manifestly, it was never the intention of the framers of the Constitution in adopting Section 174 thereof, creating the office of district attorney and authorizing the legislature to prescribe his duties, that such powers should be conferred by the legislature upon this office as would enable him to usurp the common law duties and functions of the Attorney General provided for under Section 173 of that Constitution." Kennington-Saenger Theaters, Inc. v. State, 196 Miss. 841, 869-70, 18 So.2d 483, 488 (1944). *See also* State v. Stewart, 184 Miss. 202, 184 So. 44 (1938); Dunn Constr. Co. v. Craig, 191 Miss. 682, 2 So. 2d 166 (1941); State v. Warren, 254 Miss. 293, 180 So.2d 293 (1965); *and* text corresponding to notes 11 and 12 *supra*.

[25] Amendment 6 to the United States Constitution and § 26 of the Mississippi Constitution provide, respectively, that a criminal defendant has the right for his trial to take place in the district and county where the offense occurred. The chief reason for such provisions is convenience of the court, the witnesses, the prosecutor and the defendant, and the incident fairness to the defendant.

[26] *See* MISS. CODE ANN. § 3920 (1956) and Capitol Stages, Inc. v. State, 157 Miss. 576, 592-93, 128 So. 759, 763-64 (1930).

[27] MISS. CONST. § 169.

case is reached, it is generally said that "the *State* got a conviction;" or "the *State* failed to obtain a conviction;" or "the *State* never prosecuted anyone." Thus the disposition of any criminal matter of notoriety reflects upon the entire State, not just upon a single locality. In sum, this dual nature of criminal prosecutions is compatible with the idea that the district attorney, normally performing only local functions, and the Attorney General, primarily concerned with state-wide functions, possess concurrent power to initiate prosecutions within a given district attorney's district.

Pertinent to a decision by the Attorney General to prosecute or to forbear from prosecuting is the rule that he may neither increase nor diminish the powers of the district attorney.[28] If the Attorney General decides against prosecuting *solely* because prosecution is the duty of the district attorney, the former is, in effect, increasing the latter's power by granting him exclusive power to prosecute. If, on the other hand, the Attorney General institutes criminal proceedings, he does not diminish the district attorney's inherent power; he only initiates the procedure (which either official properly might have done) before the district attorney is prepared or willing to perform his duty. The district attorney has no meritorious complaint because he "cannot encroach on the powers of the Attorney General."[29]

Because the office of Attorney General possesses broad common law power which may only be decreased by Constitutional enactment,[30] statutes pertaining to the Attorney General may be viewed only as statements of legislative policy, as directives which are mandatory, as grants of additional power, or as provisions which are inapplicable to the Attorney General in his official capacity. There are several statutory provisions which, when read in this light, indicate that the Attorney General's inherent power includes the power to prosecute for criminal offenses.

The statute declaring it to be the duty of the district attorney to prosecute all criminal prosecutions states that such action must be treated "with like effect as if the suit was instituted by the attorney-general."[31] It takes no congenital endowment of perceptive mastery for one to determine from this phrase that whatever effect the district attorney's action has is in the image of the effect which the Attorney General's action would have in the same situation. Since the Constitution does not limit the power of the Attorney General, and since the district attorney's duty to prosecute is patterned after the power of the Attorney General, the inescapable conclusion is that their powers to prosecute are concurrent.[32]

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[28] Capitol Stages, Inc., v. State, 157 Miss. 576, 591-92, 128 So. 759, 763 (1930).

[29] *Id.*

[30] *See* text corresponding to note 11 and 12 *supra.*

[31] MISS. CODE ANN. § 3920 (1956).

[32] Thus far the only apparent distinction in this scheme is that the district attorney's powers are stated in mandatory terms while those of the Attorney General are couched in permissive or discretionary language. *See* MISS. CODE ANN. § 3920 (1956), and text corresponding to notes 14 and 21 *supra.*

To emphasize the duties and powers of the Attorney General, the legislature has provided that

> [T]he attorney-general *shall,* when required by the public service, or when directed by the governor, . . . assist the district attorney . . . in the discharge of his duties . . ., and shall have the same right as the district attorney to enter the grand jury room while the grand jury is in session and to perform such services with reference to the work of the grand jury as the district attorney is authorized by law to perform. (emphasis added).[33]

The standard by which the Attorney General's discretion must be guided and judged is the "public service." His action is made mandatory under such circumstances. It is patent that the public is served when a violator of the criminal laws is prosecuted.[34] If the district attorney has failed to prosecute, he is without power to limit the Attorney General because to do so would constitute an encroachment upon his common law power and his statutory duty.[35] Additionally, if the district attorney has not begun to act and does not intend to act, any steps taken by the Attorney General will, nonetheless, *assist* the district attorney. This is so because the district attorney has a legal duty to prosecute for the State in his district,[36] and if the Attorney General conducts the entire prosecution alone, he is assisting the district attorney by discharging his legal obligation.[37] The portion of the statute which specifically grants to the Attorney General the power to work with the grand jury merely restated his inherent common law power.[38]

Finally, it is interesting to note that the offices of Attorney General and district attorney are treated identically by a statue limiting their unofficial activities in the criminal law area. Section 2299 of the Mississippi Code Annotated (1956) provides that neither official may advise or defend criminals. This equal treatment in the criminal law area is just another indication that these officials share concurrent power to prosecute criminal defendants.

The Attorney General of Mississippi, because his *powers* are coextensive with those of the common law office whose name it bears, may conduct any criminal prosecutions necessary to enforce the laws of the State and protect the public. The fact that the primary *duty* to perform this function has been shifted to the district attorney has no effect on

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[33] Miss. Code Ann. § 3845 (1956).

[34] *See* first sentence after note 5 *supra,* and text corresponding to note 14 *supra.*

[35] Capitol Stages, Inc. v. State, 157 Miss. 576, 591-92, 128 So. 759, 763 (1930); Miss. Code Ann. § 3920 (1956).

[36] Miss. Code Ann. § F3920 (1956).

[36] Miss. Code Ann. § 3920 (1956).

that he could only aid the district attorney in a case which the latter had previously begun—it would be an attempt to do by statute that which may only be done by constitutional amendment, *i.e.*, remove some of the Attorney General's constitutional power. *See* text corresponding to notes 11, 12, and 14 *supra.*

[38] *See* text corresponding to notes 14 and 16 *supra.*

the inherent power of the Attorney General.[39] The Mississippi Supreme Court has said that the Attorney General possesses the right "to institute, conduct, and maintain *all suits necessary for the enforcement of the laws of the state*. . . ."[40] If the "chief law officer of the realm" were to vigorously exercise his power, his action doubtless would have a profound positive effect on the quality of criminal prosecutions.

George B. Pickett, Jr.

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[39] 2 R.C.L. § 16, (1914).

[40] Dunn Constr. Co. v. Craig, 191 Miss. 682, 712, 2 So.2d 166, 174 (1941), *citing* 157 Miss. 576, 128 So. 759. (emphasis added).

RECENT BOOKS

DIPLOMATIC PRIVILEGES AND IMMUNITIES.

Clifton E. Wilson. Tucson, Arizona: The University of Arizona Press, 1967. Pp. 300. $8.50.

On 24 April 1964, the 1961 Vienna Convention on Diplomatic Relations became the most important source of international rules governing diplomatic privileges and immunities. Dr. Wilson's monograph emphasizes post-World War II developments and practices in the field during the period, 1945-1960. Had he gone no further, his extensive coverage of the period for the topics considered would have been complete (with respect to English language source materials). However, in including incidents and developments in the early 1960's, the author has only mentioned today's primary source of authority *en passant.* Therein lies the chief criticism of this book.

Dr. Wilson commences his work with a review and appraisal of the three traditional theories to have evolved in support of the practice of diplomatic privileges and immunities. Persons whose privileged status is explored, include: "(a) diplomatic agents, including subordinate personnel, families of diplomats, and local nationals employed by diplomatic missions and (b) non-dipomatic personnel such as military, information, economic and similar agents and members of special missions. It excludes immunities extended to consular officers, persons associated with international organizations, and diplomatic premises."

Most, but not all, of the traditional areas of diplomatic privileges, immunities, customs and courtesies are considered. Regrettably, the author does not touch upon the problems encountered by these categories of diplomats and non-diplomats with respect to their freedom of movement on entry into, movement within, and departure from, the host country. During the post-1945 period there have been numerous incidents involving curtailment of the diplomat's mobility which have directly prevented him from the performance of his special responsibilities. Recognition of the diplomat's need for freedom of mobility in order to effect his duties is manifest in Articles 26 and 40 of the Vienna Convention. He does refer us however, to his book, *Cold War Diplomacy: The Impact of International Conflicts on Diplomatic Communications and Travel,* in which the topic is covered. Directly related to the diplomat's freedom of movement is his travel document—the diplomatic passport. It would have been helpful to include some discussion on the value and use of the diplomatic passport to its bearer in a work of this nature.

The author has relied heavily on two primary source materials: newspapers—primarily the New York Times and The Times (London), and the replies to a questionnaire answered by more than two hundred ex-foreign service officers and staff members. Since a great deal of reliance is placed on this last-mentioned source of information, I would have thought it appropriate to include the questionnaire in an appendix. Both sources have provided the author and reader with many fascinating incidents such as the Belgian consul general in Syria whose car, upon inspection by Lebanese officials disclosed a minor arsenal of "33 submachine guns, 28 pistols, 32 revolvers, 16 hand grenades, 1,800 rounds of machine gun ammunition, 1,500 rounds of other ammunition, several bombs, and some demolition equipment" (p. 137), or the American embassy employee who utilized the duty-free privilege in the host country and "imported five or six cars in as many weeks and offered them in classified advertisements to anyone meeting his price" (p. 142), or the French consul whose waistcoat yielded 290 watches to persistent British customs officials (p. 136). There are extensive footnotes also replete with a subsidiary array of case studies with emphasis on American and British practices.

At times, the author reaches back in time for the purpose of showing a trend of development. He closes the book with an assessment of the changing nature of privileges and immunities. The work is scholarly, well-organized and written in a pleasant style. Because of the interesting cases amassed by Dr. Wilson, I believe the volume would also appeal to the general reader as well as political scientists, scholars of international law and those in the foreign service.

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THE LIMITS OF THE CRIMINAL SANCTION.

Herbert L. Packer. Stanford, California: Stanford University Press, 1968. Pp. 375.

It is terribly satisfying to have before us Professor Packer's stylish essay so soon after the disquieting and evasive Report by the President's Commission on Law Enforcement and the Administration of Justice.[1] For all its fine research and statistical data, the Commission failed to

[1] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *The Challenge of Crime in a Free Society*, AVON BOOK, NEW YORK (1968).

grapple with the hard and disturbing questions of just what conduct and/or statuses should be deemed criminal. Through a framework of perceptive, functional analysis of substantive law and process, Professor Packer argues boldly for confining the criminal law to those offenses with which it is best equipped to deal.

Although Professor Packer was among the critics of the Commission's timidity, this book does not constitute an "answer" to the Report. Rather it is the carefully constructed philosophical statement of a leading criminal law scholar, drawing upon economics, sociology and other disciplines for the argument. His muses are Bentham and Mill; his inspiration the rapidly rising crime rates, a more restrictive judicial view of the state's powers of enforcement, the proliferation of newly created offenses, and the alienation of substantial segments of society from the law. His intended audience is the legislator, the lawyer, and the concerned layman. The essay, though scholarly in tone and in substance, avoids footnotes and jargon and is written in a smooth and highly readable style.

In the first of three parts, Professor Packer attempts a rationale and justification of punishment. His underlying bias is that no theory of punishment is truly adequate both to diminish crime and to advance freedom and justice for the individual, the assumed goal of all law. Thus he rejects the theory of retribution as primitive in that it includes goals which are in no way beneficial to the individual or society. He goes to greater lengths to put down the rising tide of behavioralism: that school which prefers incapacitation and rehabilitation of the criminal to punishment in the traditional sense. Incapacitation, writes Packer, is too often a mask for retribution; it also assumes that the fact of the crime is substantial evidence of the offender's propensity to commit the same or other crimes again, a proposition empirically unsound for many types of offenses. Rehabilitation theory assumes society now has the means to alter effectively the criminal personality; science has not advanced so far, nor are any substantial resources likely to be allocated to rehabilitation in the penal system. Whereas rehabilitation may be the goal in determining the length of sentence and the nature of particular punishment, it cannot serve as a justification for the imposition of some punishment. For Professor Packer, the primary justification for punishment must be the prevention of further crime, and the theory most adequately describing this goal is the traditional utilitarian value of deterrence. Although it is fundamentally unethical in that the state is using individuals as object lessons for society and although deterrence is frequently ineffective, most notably for criminal sub-cultures and for the impoverished, it is the best starting point for developing a unitary theory of punishment for all types of criminal behavior. As limitations to the state's

power under this theory, Packer would require the presence of an actual offense and of the element of culpability on the part of the offender.

In Part II, Professor Packer examines specific aspects of the criminal process and the judicial trend toward limiting the state's power over the criminal suspect from pre-arrest investigation to conviction. The discussion is framed around two nearly polar models: The Crime Control Model and the Due Process Model. The basic aims of the former are speed and finality; once the police and prosecutor are convinced by their evidence of the suspect's guilt, he should be brought to punishment as speedily and efficiently as possible. The latter model stresses formality in the fact-finding process, relying on an impartial tribunal to assess the claims of state and suspect. It is distrustful of the entire criminal process itself and seeks to correct abuses through its own mechanisms, the courts, at the sacrifice of efficiency. In addition, the value of equality demands that the adversary struggle between suspect and state be as even as possible, the most important aspect here being defendant's right to counsel. Packer tells us that the trend has been away from the Crime Control Model and towards the Due Process Model. Thus, the increasing inefficiency of the mechanisms for bringing a suspect to punishment militate toward greater selectivity in defining criminal behavior.

From his examination of rationale and process, Packer reaches his principal thesis:

> The [criminal] sanction is at once uniquely coercive and, in the broadest sense, uniquely expensive. It should be reserved for what really matters.[2]

Part III is devoted to an analysis of other limits to the criminal sanction and to an application of the thesis to selected areas of conduct currently deemed criminal. For some types of conduct now considered criminal, other lesser sanctions are appropriate. Professor Packer endorses the proposal of the American Law Institute's Model Penal Code to create a body of civil offenses against the state which would encompass much of the strict liability regulatory legislation that has arisen in this century. In substance and in process, this type of offense would be made as distinct from the criminal law as possible; the sanction would be monetary. Other limiting factors are the lack of widespread moral commitment to some offenses resulting in sporadic enforcement, the alienation brought about by abrasive police tactics necessitated by victimless crimes, and the "tariff" effect of laws like those against abortion and narcotics in creating financial rewards for illicit participants in the busi-

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[2] PACKER, THE LIMITS OF THE CRIMINAL SANCTION 250 (1968).

ness. Specifically, Packer attacks laws relating to public and private sexual practices, obscenity, narcotics, alcohol, and gambling to illustrate his limiting approach in operation.

The strength of the essay is Professor Packer's intellectual candor and ability to strip away the panoply of myth and equivocation from criminal law analysis. He is not bound by the political demands that operate on a President's Commission or even an American Law Institute. The third section of his book is especially compelling for the common reader, exposing with clarity and eloquence the precise social interests behind many types of crime and their enforcement. Part I has more appeal to the student of jurisprudence and contains little that is new on the subject. Its principal importance is to set the stage for the arguments in Part III. By contrast, Part II seems dispensable; its importance to the argument does not justify its length and the two models are not so startling as to call for extended analysis.

Perhaps the greatest shortcoming of the volume is the author's decision to exclude analysis of the juvenile offender issue.[3] In a sense, this problem provides the very roots of the behavioralist position; hence Professor Packer's refutation of the behavioralist approach in Part I is less than persuasive. By the same token, discussion of juvenile crime raises so many other issues that inclusion might have made organization of this essay impossible.

Professor Packer's essay is a valuable addition to the literature for the student of law as well as for the layman. It pulls together in one clear and coherent package much of what formerly has been available only through the piecing together of disparate scholarly efforts. Hopefully, even the legislator to whom it is addressed will read and appreciate this useful volume.

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[3] In 1965, more than half of the arrests for major crimes against property and "a substantial minority" of arrests for major crimes against the person were committed by juveniles. Report of the President's Commission, *supra* note 1, at 169.

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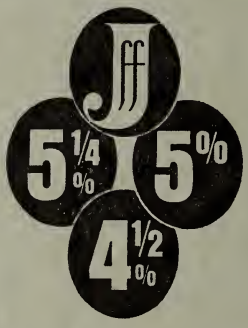

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